March 14. 79. Arg'd W. H. Swayne

9 — 619.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 183.

BRIGHAM YOUNG, PLAINTIFF IN ERROR,

vs.

SARAH M. PRATT.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 4, 1876.

Com'l 8866. 1907-8.

SUPREME COURT OF THE UNITED STATES.

No. 183.

BRIGHAM YOUNG, PLAINTIFF IN ERROR,

vs.

SARAH M. PRATT.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

INDEX.

	Original.	Print'
Statement on motion for new trial	1½	1
Appeal, notice of motion to dismiss	2	1
Appeal, motion to dismiss overruled	3	2
Declaratory statement by B. Young	4	2
S. M. Pratt	5	2
Testimony of B. Young	6	3
Ja's Jack	7	4
H. G. Park	8	4
Exhibit A	9	5
Disclaimer of S. M. Pratt	10	5
Stipulation	11	6
Testimony of H. G. Park	12	6
W. W. Riter	16	8
B. Young, jr	16	8
B. Young	18	9
F. W. Ellenbeck	20	10
S. M. Pratt	23	12
H. Pratt	29	14
A. Pratt	32	16
Rulings on testimony	35	17
Findings of fact	36	18
Findings of law	37	19
Decree district court	38	19
Assignment of errors	39	20
Opinion district court	42	21
Motion for new trial	51	25
Order overruling motion	52	26
Appeal notice	52	26
Undertaking	53	26
Stipulation	56	27

	Original.	Print.
Judgment	58	28
Appeal to Supreme Court United States	58	29
Opinion	60	29
Bond	68	31
Assignment of errors	70	32
Affidavit of value	73	34
Clerk's certificate	74	34
Writ of error	75	34
Citation and service	77	35
Stipulation	79	36
Bond	81	36
Clerk's certificate	83	37

1 TERRITORY OF UTAH,
County of Salt Lake, ss:

In the supreme court in and for the Territory of Utah.

Be it remembered that on the 15th day of April, A. D. 1876, came Brigham Young, by his attorneys, Williams & Young, and filed with the clerk of said court a transcript of the records and proceedings had in the district court of the third judicial district of the Territory of Utah, of which the following is a full, true, and correct copy, namely:

1½ *Statement on motion for new trial, and to be used also as a statement on appeal from the judgment rendered in said court in said matter.*

TERRITORY OF UTAH,
County of Salt Lake:

Third judicial district court.

In the matter of the applications of Sarah M. Pratt and Brigham Young for deeds in fee-simple from the mayor of Salt Lake City for the south half of lot 5, block 76, plat A, Salt Lake City survey.

This is a proceeding instituted by the above-named parties in the probate court for Salt Lake County, Utah Territory, under an act of the legislature of said Territory, approved February 17, 1869, entitled "An act prescribing rules and regulations for the execution of the trust arising under an act of Congress entitled 'An act for the relief of the inhabitants of cities and towns upon the public lands,' approved March
2 2nd, 1867," to obtain deeds from the mayor of Salt Lake City for the south half of lot 5, block 76, plat A, Salt Lake City survey.

The said probate court rendered its decision in said matter on the 28th day of November, 1873, adjudging that the applicant, Brigham Young, was the rightful occupant of the disputed premises, and entitled to the deed therefor.

Afterward, on the 3rd day of February, A. D. 1874, the said Sarah M. Pratt filed and served her notice of appeal from the said judgment, and perfected the said appeal on the same day by filing her undertaking on appeal. And on the 1st day of September, 1874, the transcript on the said appeal was filed in this court.

Afterward, the respondent, Brigham Young, duly served and filed his notice of motion to dismiss the said appeal; which notice, with the admission of service and endorsements by the clerk, was in the words and figures following, to wit:

Notice of motion to dismiss appeal.

In the district court of the 3rd judicial district of Utah Territory, county of Salt Lake.

SARAH M. PRATT, APPELLANT,
vs.
BRIGHAM YOUNG, RESPONDENT,

To D. Cooper, esq., attorney for said Sarah M. Pratt, appellant:

Please take notice that we will move the court at the Federal court-room in Salt Lake City, on the fifth day of October, 1874, at ten o'clock

in the forenoon, or as soon thereafter as counsel can be heard, for an order dismissing the appeal in this action on the following grounds, to wit:

3 1st. Because the appeal was not taken and perfected within the time required by law.

2nd. Because the appeal-bond filed herein is insufficient in form and substance.

Dated September 22nd, 1874.

WILLIAMS, YOUNG & SHEEKS,
Attorneys for Respondent.

Service of the within notice admitted this 22nd day of September, 1874.

D. COOPER,
P'r NUCKOLS,
Attorney for Sarah M. Pratt.

Filed September 23, 1874.

JOS. F. NOUNNAN, *Clerk*,
By WILLIS P. McBRIDE,
Deputy Clerk.

Afterward, the said motion was argued and submitted to the court, and the said court thereupon overruled the same, to which ruling the said respondent, Brigham Young, by his counsel, duly excepted.

And afterward, the said cause, being regularly called, was tried on the 16th day of November, A. D. 1875, before the court without a jury on the declaratory statements of the parties, and testimony and written proofs adduced, certified to this court by the clerk of the said probate court, in pursuance of the 4th section of the said act of the said legislature.

Which declaratory statements, testimony, and written proofs, as certified, are in the words and figures following, to wit:

4 *Declaratory statements.*

TERRITORY OF UTAH,
Salt Lake City, County of Salt Lake:

JAN. 12TH, 1872.

To the Hon. Elias Smith, probate judge in and for said county:

The undersigned declares that he is the legal owner of possession of the following-described piece or parcel of land, to wit:

Lot five (5) in block seventy-six (76), containing one and a quarter (1¼) acres, as plotted in plat A, Salt Lake City survey; and claims as of right to be so adjudged that he may become possessed of the same in fee-simple according to law.

BRIGHAM YOUNG, SEN.

(Endorsed:) No. 1502, 2926. Declaratory statement of Brigham Young, sen., claiming lot 5, in block 76, plat A. Filed 13th Jan., 1872. Entered book B, page 5011. D. Bockholt, county clerk. F., dep.

5 UNITED STATES OF AMERICA,
Territory of Utah, County of Salt Lake, ss:

To all parties whom it may concern, take notice:

The undersigned, Sarah M. Pratt, hereby claims to be the rightful owner and entitled to the possession of the following-described lot or parcel of ground, to wit:

Lot (5) five, block (76) seventy-six, plat A, of Salt Lake City survey, situate in 14th Bishop's ward of said city; to all of which said Sarah M. Pratt claims a deed in fee-simple absolute, in accordance with an act of the legislative assembly of the Territory of Utah, entitled "An act prescribing rules and regulations for the execution of the trust, etc.," approved February 17th, A. D. 1869.

SARAH M. PRATT,
By GEO. R. MAXWELL,
Her Attorney in Fact.

In presence of—
O. PRATT,
J. K. KINGSLEY.

(Indorsed:) Adverse claimant, No. 2929, 1502. Declaratory statement of Sarah M. Pratt, claiming lot 5, block 76, plat A. Filed April 9, 1872. Entered book B, page 469. D. Bockholt, co. clerk.

6 The following is the evidence:

In the matters of the several applications of Brigham Young, sen., and Sarah M. Pratt for deed in fee-simple.

BRIGHAM YOUNG, jun., first being duly sworn according to law, on oath deposes and says on the part of Brigham Young, sen.:

Interrogated by Williams, of Williams & Young.

Ques. 1. Do you know lot 5, block 76, plat A, Salt Lake City?

Ans. I do.

Ques. 2. Did you ever reside on that lot; and, if so, during what time?

Ans. I am positive I lived there during the whole of the year 1865, 1866, and until the fall of 1867.

Ques. 3. By whose permission did you reside on that lot?

Ans. By Brigham Young, sen.

Ques. 4. By whose order did you surrender the premises, and to whose possession?

Ans. By order of Brigham Young, sen., and to him the possession was given.

Ques. 5. State whether or not you were in possession of the whole lot during the time you lived there; and, if not, give a description of the portion you were in possession of.

Ans. I was in possession of only a part of that lot; to the best of my knowledge, I was in possession of all of the lot except a small portion on the northeast corner, occupied by my father, Brigham Young, sen.

7 Ques. 6. State whether or not you have ever been an agent for your father, Brigham Young, in relation to his real property; and, if so, at what time.

Ans. During the year 1872 I was such agent.

Ques. 7. State whether or not during that time you ever received as such agent from Orson Pratt, sen., any rent for the occupation of that lot or any portion of it; and, if so, state the amount.

Ans. I did receive rent from his reputed agent for the occupation of a portion of said lot, the amount being fifty dollars per month, which I received twice for two months' rent.

BRIGHAM YOUNG, JUN.

Subscribed and sworn to before me this 11th day of April, 1873.
D. BOCKHOLT,
Probate Clerk.

JAMES JACK, being first duly sworn according to law, on oath says, on the part of Brigham Young, sen.:

Interrogated by Williams, of Williams & Young.

Ques. 1. Do you know Albert Carrington and James A. Little; and, if so, state where they reside, and where they are at the present time?

Ans. The last time I heard of Albert Carrington, which is about two weeks ago, he was in Jerusalem, Asia. When at home, resides in Salt Lake City. James A. Little resides in the southern part of the Territory of Utah, I think near S't George, and to the best of my knowledge, he is there now.

Ques. 2. The paper marked "Exhibit A," and hereunto attached, is here placed in the hands of the witness. State whether or not the name of Albert Carrington thereon written is the signature of Albert Carrington.

8 Ans. Yes. I know that to be his signature, I being well acquainted with the same.

JAMES JACK.

Subscribed and sworn to before me this 11th day of April, A. D. 1873.

D. BOCKHOLT,
Probate Clerk.

Here counsel for Brigham Young offered in evidence Exhibit A.

HAMILTON PARK, being first duly sworn according to law, on oath deposes and says, on the part of Brigham Young, sen.:

Interrogated by P. L. Williams, of Williams and Young.

Ques. 1. State whether or not you have ever been Brigham Young's real-estate agent; and, if so, during what time.

Ans. I was for seven years prior to the spring of 1869.

Ques. 2. State whether or not during that time, as such agent, you had the charge of lot 5, block 76, plat A, Salt Lake City.

Ans. I had.

Ques. 3. State, if you know, the facts in relation to the occupation of that lot, or a portion of it, by Orson Pratt or his wife Sarah M. Pratt.

Ans. In the fall of 1867 I was instructed by Brigham Young, sen., to have Brigham Young, jun., who was at that time residing on the lot, to remove from it and to let Orson Pratt have the use of it, and to collect rent from him for such use at fifty dollars per month. I did so, and Orson Pratt came into the possession of it, with his wife Sarah

9 M. Pratt, and from that time until the spring of 1869, when I ceased to be the agent of Brigham Young, I collected of T. W. Ellerbeck, as the agent of Orson Pratt, fifty dollars per month rent for the said premises.

Ques. 4. State, if you know, whether Orson Pratt during that time occupied the whole of that lot.

Ans. No, he did not; he occupied the portion south of the partition fence, which now runs east and west through the lot near the centre.

Ques. 5. During the time, from the fall of 1867 to the spring of 1869, state if you know whether or not Brigham Young was the owner of that lot and in possession thereof.

Ans. To the best of my knowledge, it was; I so understood; he had the control and possession of it.

HAMILTON G. PARK.

Subscribed and sworn to before me this 11th day of April, 1873.

D. BOCKHOLT,
Probate Clerk.

(Indorsed:) Orson Pratt to Brigham Young, transfer of lot 5 in block 76, plat A, of Great Salt Lake City survey. Recorded transfer-book B, page 340, November 2nd, 1861. Edwin D. Woolley, deputy recorder for Great Salt Lake County.

EXHIBIT A.

Be it known by these presents that I, Orson Pratt, of Great Salt Lake City, in the county of Great Salt Lake and Territory of Utah, the rightful claimant and owner of possession of lot 5, in block 76,
10 containing 1¼ acres, as platted in the plat A, Great Salt Lake City survey, do, for the sum of four thousand dollars, paid by Brigham Young, sen., of Great Salt Lake City, the receipt whereof is hereby acknowledged, sell, release, quitclaim, and transfer all my right of claim, interest, and possession of and to the aforesaid premises, together with all the rights, privileges, and appurtenances thereunto belonging, to the said Brigham Young, sen., his heirs or assigns.

Dated this twenty-ninth day of October, one thousand eight hundred and seventy-one.

ORSON PRATT.

ALBERT CARRINGTON.
JAMES A. LITTLE.

TERRITORY OF UTAH,
County of Great Salt Lake:

I, John T. Caine, a notary public in and for said county, certify that the signer of the above transfer, personally known to me, appeared this thirty-first day of October, A. D. 1861, and acknowledged that he of his own choice executed the foregoing transfer.

JOHN T. CAINE,
Notary Public.

Disclaimer.

In the matter of the several applications of Brigham Young, sen., and Sarah M. Pratt for deed for lot 5, block 76, plat A, Salt Lake City.

11 And now comes Sarah M. Pratt, one of the applicants above named, by D. Cooper, her attorney, and disclaims all right, title, interest, claim, and demand in or to the above-described lot and premises, saving and excepting to one hundred and sixty-five (165) feet square of said lot, being the south half thereof and that enclosed by a board fence, and within which is the dwelling-house now in the possession of this applicant, and of which she now is, and ever since the 12th day of March, A. D. 1868, has been, the occupant in person. April 15th, 1873.

D. COOPER,
Attorney for Sarah M. Pratt.

(Indorsed:) In the matter of the several applications of Sarah M. Pratt and Brigham Young for deed in fee-simple. Disclaimer. Filed April 15, 1873. D. Bockholt, clerk.

In the matter of the several applications of Brigham Young, sen., and Sarah M. Pratt for deed in fee-simple to lot 5 in block 76, plat A, Salt Lake City survey.

TUESDAY, *April 15th*—11.45 a. m.

Parties met.

D. Cooper for Sarah M. Pratt, and Le Grand Young, of Williams & Young, for Brigham Young.

By mutual agreement of the attorneys for the applicants, respectively, the testimony of Brigham Young, jun., James Jack, and Hamilton G. Park, taken April 11, 1873, in the absence of the attorney for M'r's Pratt, is open to objection in any and all its parts, as to relevancy or irrelevancy, to the same extent as such objections might have been taken at the time these questions were put and the response was given.

12 And, further, that the testimony of the witnesses taken before the clerk of probate shall all be taken subject and open to objection by the attorneys of either party, as to its relevancy or materiality, to the same extent as such objections might have been interposed upon the taking of such testimony.

HAMILTON G. PARK cross-examined by D. Cooper, attorney for Sarah M. Pratt.

I stated in my direct examination that Orson Pratt came into possession of the lot in controversy in the fall of 1867, with his wife, Sarah M. Pratt.

Ques. 1. How did Orson Pratt come into possession of that lot, or any part of it, in 1867?

Ans. I was real estate agent for B. Young at that time. Brigham Young, jun., was living in the house in October, 1867. His father told me to let B. Young, jun., have another house known as the F. B. Woolley house, opposite the city hall, and to let M'r Pratt put his family into that house.

Ques. 2. Did M'r Pratt personally go into the occupation of that house in the fall of 1867?

Ans. I don't know.

Ques. 3. Did he not then and for a long time thereafter reside, and does he not still reside, in the 19th ward of this city?

Ans. I don't know, neither then nor now.

Ques. 4. Then you don't know that he personally had possession of that lot at any time since the summer of 1867, or the south half thereof?

Ans. I know that on the 18th day of October, 1867, I delivered the key of the other house to Brigham Young, jun.

Ques. 5. Do you know of your own knowledge that Orson Pratt,
13 sen., had been in the personal occupancy of any portion of lot 5, block 76, plat A, Salt Lake City, since September, 1867?

Ans. M'r Pratt has been there, in and fixing about the lot.

Ques. 6. When was M'r Pratt there fixing about the lot, and what did he do?

Ans. I cannot specify the time nor the amount of work done.

Ques. 7. Specify what character of work was done at any time on the portion of the lot occupied by M'r's Pratt.

Ans. I can simply say that on one occasion while passing along the sidewalk I saw him putting up a gate, which had come down. This was in the year 1867.

Ques. 8. When was the first rent paid by Orson Pratt for the use and occupation of lot 5, block 76?

Ans. I don't know. I would have to go to my book for reference.

Ques. 9. Where are those books?

Ans. In president Young's office.

(Further examination on this suspended until witness can have access to the books in question.)

Ques. 10. You state in your direct examination that as agent of Brigham Young you collected rent from the fall of 1867 till you ceased to be his agent, till the spring of 1869, of T. W. Ellerbeck, as the agent of Orson Pratt, fifty dollars per month rent for the said premises, viz, the southern portion of lot 5, block 76?

Ans. When I did not, it was because I failed in carrying out my instructions.

Ques. 11. When did you first receive instructions from Brigham Young to collect rent of Orson Pratt for these premises?

14 Ans. I do not recollect the time.

Ques. 12. What was your method of collecting rents; was it to apply to the tenant, or wait until the tenant gave you?

Ans. Those flush of means came to the office; others, I was in the habit of calling on them monthly.

Ques. 13. Did you, at any time, between the month of October, 1867, and the month of April, 1868, call upon Orson Pratt or any of his family for the rent of these premises?

Ans. I did not. I was not so instructed. I was told to apply to M'r Ellerbeck when I received my instructions.

Ques. 14. Why were you told to apply to M'r Ellerbeck for the rent?

Ans. I can give no reason for that, only that I was instructed to call upon him, and I did so.

Ques. 15. Did Orson Pratt ever direct you to call upon M'r Ellerbeck to obtain the rent for these premises from him?

Ans. Not that I recollect of.

Ques. 16. Why, in your answers in your direct examination, do you designate T. W. Ellerbeck as the agent of Orson Pratt?

Ans. Because I was instructed by B. Young to apply to him, and he generally paid the bill; that is, all that was paid to me.

Ques. 17. Was not M'r Ellerbeck then and since then the confidential clerk of B. Young, sen.?

Ans. I did not consider him so; he was his chief clerk, but he had a private secretary.

Ques. 18. How and in what manner was the rent that you received paid?

15 Ans. I don't comprehend that question fully. If you mean pay, it was received in cash, the same as if I drew a check.

Ques. 19. Was it by check or in money?

Ans. In U. S. currency.

Ques. 20. What has been Orson Pratt's business since the fall of 1867?

Ans. I don't know, only he does a great deal of preaching. His private business I don't know anything about.

Ques. 21. Do you know where he, Ellerbeck, got the funds to pay this rent?

Ans. No; I do not.

Ques. 22. Did either M'r Ellerbeck or M'r Brigham Young inform you?

Ans. No, sir.

Ques. 23. You stated, when your cross-examination was suspended on

the 15th instant, that by reference to certain books of entries you could fix the time of the receipt of the first rent from Orson Pratt for the premises in controversy. Have you referred to such books? and, if so, answer when you received the first rent.

Ans. March 15, 1868, is the date of the cash-book entry.

Ques. 24. How long had M'r's Pratt occupied the premises prior to that time?

Ans. From October previous.

Ques. 25. What amount of rent is entered in the cash-book of March 15, 1868?

Ans. Fifty dollars.

H. G. PARK.

Subscribed and sworn to before me this 17th day of April, 1873.

D. BOCKHOLT,
Probate Clerk.

16 W. W. RITER, being first duly sworn according to law, on oath says, on the part of Brigham Young:

Interrogated by Le Grand Young, attorney, of Williams and Young:

Ques. 1. Are you acquainted with Orson Pratt, senior?

Ans. I am.

Ques. 2. Did you ever have any correspondence with him?

Ans. Yes, sir.

Ques. 3. Are you acquainted with his signature?

Ans. Well, somewhat.

(The paper marked "Exhibit A" and attached to this record was here given to witness.)

Ques. 4. Do you know the signature purporting to be that of Orson Pratt, senior?

Ans. I could not positively swear to it; it resembles it.

W. W. RITER.

Subscribed and sworn to before me this 15th day of April, 1873.

D. BOCKHOLT,
Probate Clerk.

BRIGHAM YOUNG, junior, recalled and cross-examined by D. Cooper for Sarah M. Pratt:

Ques. 1. In your direct examination on Friday last you stated that you was the agent of your father during the year 1872, and that during that time you received two payments of rent for the premises occupied by M'r's Pratt, of fifty dollars each per month; will you now state when, how, and of whom you received that rent?

17 Ans. I think I stated, as clearly perhaps as I could, of the reputed agent of Orson Pratt, sen. I asked no questions; he paid me the money, and I receipted for it, for the occupancy of that lot; I think it was either June or July or May and June that I received it for.

Ques. 2. Of whom did you receive that rent?

Ans. I received the money from James Jack.

Ques. 3. Was it in money that you received it?

Ans. It was money.

Ques. 4. Was it before or after the 9th day of April, 1872, you received it?

Ans. I think I have answered that question; it was paid at the beginning of each month.

Ques. 5. Was it not after the 9th of April, 1872?

Ans. Well, if May and June come after April, it was after April; I could not be positive. I was in business up to August, 1872.

Ques. 6. Did M'r Jack come and voluntarily pay you that money?

Ans. I presented the receipt and he handed me the money without words.

Ques. 7. You did not ask him for it at all?

Ans. I have no recollection of saying more than "M'r Pratt's receipt," handing it to him. He returned the money without comment.

Ques. 8. Was M'r Pratt in the city at the time?

Ans. I don't know.

Ques. 9. Do you know where M'r Jack obtained that money?

Ans. I do not.

Ques. 10. You have stated that M'r Jack was the reputed agent of Orson Pratt, sen. How did he acquire that reputation?

Ans. I do not know. M'r Pyper, the former and then agent of
18 Brigham Young, sen., referred me to M'r Ellerbeck, who had left orders with James Jack to pay those receipts when presented.

Ques. 11. Who is M'r Ellerbeck, and in what relation did he stand at that time and before, and at any time since, to Brigham Young, senior?

Ans. He is a clerk. He was President Young's clerk at that time; had been before and is since.

BRIGHAM YOUNG, J'R.

Subscribed and sworn to before me this 15th day of April, A. D. 1872.

D. BOCKHOLT,
Probate Clerk.

BRIGHAM YOUNG, senior, being first duly sworn according to law, on oath says:

Interrogated by Le Grand Young, of Williams and Young, attorneys for B. Young:

Ques. 1. Who is the owner of lot number (5) five, block 76, plat A, Salt Lake City survey?

(Objected to by counsel for M'r's Pratt.)

Ans. I am.

Ques. 2. When did you become the owner of it?

(Objected to.)

Ans. In 1861 or 1862.

Ques 3. Of whom did you buy it?

(Objected to.)

Ans. Of Orson Pratt, sen.

Ques. 4. What consideration did you give him for it?

(Objected to.)

Ans. I cannot tell the exact amount.

Ques. 5. Who is in possession of that lot now, at the present time?

19 (Objected to.)

Ans. I am, as the owner of it; there are two tenants on it.

Ques. 6. You say you cannot remember what you paid M'r Pratt for it; can you state approximately?

(Objected to.)

Ans. From three to five thousand dollars.

Ques. 7. Have you ever sold or given away or agreed to sell or give away that lot or any portion of it?

(Objected to.)

Ans. I have not.

Cross-examined by D. Cooper, attorney for M'r's Pratt:

Ques. 1. This lot is divided into half, is it not, by a board fence running east and west at or near the centre?

Ans. I had a fence put up across the lot, but whether that fence is there now or not I don't know; that fence was at or near the centre.

Ques. 2. Have you at any time since the 12th day of March, 1868, been a personal occupant or inhabitant of that portion of the lot south of the fence to which you have reference?

Ans. By a tenant I have.

Ques. 3. Who was that tenant?

Ans. If the date is correct with regard to the 12th of March, 1868, I let M'r's Pratt go into the house.

Ques. 4. Has she and her family occupied that portion of said lot ever since that time by residing thereon?

Ans. She has occupied the house. I am not able to say whether she has occupied the land by improving it or not.

20 Ques. 5. The only means of occupancy by you has been by those whom you denominated tenants, has it not?

Ans. It has so far as the house is concerned. How they occupied the land I don't know.

Ques. 6. You state that you have been in possession of that lot since 1861 or 1862, as owner thereof, and by those whom you claim to be your tenants; is that the only possession you have had of the south half of that lot?

Ans. My own family lived there prior to the time that M'r's Pratt occupied it, I think.

Ques. 7. What member or members of your family occupied the south half of that lot prior to the time M'r's Pratt moved in in the year 1868?

Ans. I can't name any particular member, except my son Brigham; he is the only one I can remember.

BRIGHAM YOUNG.

Subscribed and sworn to before me this 17th day of April, 1873.

E. SMITH,
Probate Judge.

T. W. ELLERBECK, being first duly sworn on the part of Brigham Young, sen., deposes and says:

Interrogated by Le Grand Young, of Williams & Young, attorneys:

Ques. 1. Are you acquainted with Orson Pratt, sen.?

Ans. Yes, sir.

Ques. 2. How long have you known him?

Ans. Twenty years.

Ques. 3. Are you acquainted with his handwriting and signature?

21 Ans. I am.

(Here counsel for Brigham Young handed witness a paper marked "Exhibit A," hereunto attached, and asked him the following question.)

Ques. 4. Is the signature on that paper, purporting to be a deed, that of Orson Pratt, or not?

Ans. It is; this is his signature.

Ques. 5. Are you acquainted with Albert Carrington?

Ans. I am.

Ques. 6. Where is he at the present time?

Ans. He is in Europe or Asia.

Ques. 7. Are you acquainted with his handwriting?

Ans. Yes, sir; well acquainted.

Ques. 8. Look at the names of the attesting witnesses to the deed and say if either of them are his?

Ans. The upper signature of the two is Albert Carrington's signature.

(Here counsel for Brigham Young offers Exhibit A in evidence.

The foregoing testimony taken subject to objections.)

Cross examined by counsel for M'r's Pratt:

Ques. 1. Were you at any time, if so when, appointed by Orson Pratt as his agent?

(Objected to by cousel for Young.)

Ans. I have been requested by him, at times, to let portions of his family have orders for provisions.

Ques. 2. Have you been in any other manner appointed by Orson Pratt or requested by him to act for him?

Ans. I was once requested and appointed by him to drive team for him.

22 Ques. 3. Have you been requested or appointed by him to act for him as his agent in any other respects; if so, what?

Ans. I don't remember any other.

Ques. 4. Did he ever request or appoint you his agent to disburse money for him?

Ans. Not that I remember.

Ques. 5. Did you ever, as his agent, pay to Brigham Young, sen., or to any agent or representative of his, any rent for the property now occupied by M'r's Sarah M. Pratt?

Ans. I paid the monthly rent with my own hands into the hands of Brigham Young's agent, the same times and periods that we were paying provisions over to his family. I paid the monthly rent during the same period of time for several years, from the winter of 1868 and 1869 until very recent time. I paid the rent right along and many thousand dollars' worth of provisions.

Ques. 6. Did you pay this rent as the agent of Orson Pratt, sen.?

Ans. I did; as his agent in fact.

Ques. 7. When were you appointed by Orson Pratt, sen., his agent in fact for the payment of this rent, and how?

Ans. I was requested by B. Young, trustee in trust, whose clerk I was, to assist the family and to assist Orson Pratt, and Orson Pratt requested me, when his family came round for provisions, to let them have them, and when the agent of Brigham Young came round to collect the rent I paid it over to him, instead of to Orson Pratt, so as to avoid the trouble.

Ques. 8. Is that the way you became his agent in fact?

Ans. That is the way.

23 Ques. 9. You were acting at the time as the agent of Brigham Young, sen., were you not?

Ans. As a clerk; not as agent.

Ques. 10. By whose directions did you pay to the agents of Brigham Young the rent above referred to?

Ans. I paid the rent under those general instructions of the trustee in trust to assist the family of Orson Pratt.

T. W. ELLERBECK.

Subscribed and sworn to before me this 17th day of April, A. D. 1873.
E. SMITH,
Probate Judge.

SARAH M. PRATT, being first duly sworn according to law, on oath says:

Ques. 1. Where do you reside?

Ans. In Salt Lake City.

Ques. 2. Where in Salt Lake City, and on what lot or part of a lot and block do you reside?

Ans. It is the south half of lot 5, block 76, plat A.

Ques. 3. When did you first occupy that lot?

Ans. About nineteen years ago.

Ques. 4. Did any one precede you and your family in the occupation of that lot since the settlement of this country?

Ans. No one.

Ques. 5. Up till what time did you continue to occupy said premises?

Ans. Up to the fall of 1861, I think.

Ques. 6. What improvement, if any, was made upon that lot by you or any one of your family prior to the fall of 1861?

24 Ans. All the improvements that have ever been made on the lot I made. I built the house.

Ques. 7. Do you refer now to the whole lot, or that portion you now occupy?

Ans. The portion I now occupy.

Ques. 8. What do those improvements consist of?

Ans. The house, the fence, the setting out of trees, and there was a large barn there at the end of the lot that was taken away after I left, and which I built myself. The house is of adobies, 4 rooms in the south part of the house, and is a one story; the other part is two story with two rooms below and two above.

Ques. 9. By whose industry and labor was that house erected and the other improvements made?

Ans. By myself and family—the boys.

Ques. 10. You stated that you continued to occupy it by yourself and family until you were sent south about the fall of 1861; when, after that, did you return to the occupancy of the south half of the lot?

Ans. Five years the 12th of the last month I moved into this house again.

Ques. 11. Have you continued to occupy it from that time to this?

Ans. I have.

Ques. 12. For what purpose have you so occupied it?

Ans. For a dwelling for myself and family.

Ques. 13. For what purpose do you occupy the lot?

Ans. For the benefit of myself and family.

Ques. 14. Has that been your home of yourself and family since the twelfth of March, 1868?

25 Ans. It has.

Ques. 15. How, if at all, is the south half of that lot enclosed?

Ans. By a board and picket fence.

Ques. 16. How long has it been so enclosed?

Ans. The division fence was put up soon after I returned there, running it across the lot east and west; the picket fence I had put around the whole lot before I went South.

Ques. 17. Is there any other ground within the enclosure referred to than that designated as the south half of lot 5

Ans. There is not.

Ques. 18. Are you the wife of Orson Pratt, sen.?

Ans. I am.

Ques. 19. How long have you been the wife of Orson Pratt?

Ans. I think it is 37 years in July.

Ques. 20. Since your return to the premises now occupied by you, has Orson Pratt resided there?

Ans. He has not.

Ques. 21. Who composes your family that has resided on those premises with you since 1868?

Ans. My own children; sometimes five and sometimes but two.

Ques. 22. Who has provided for the support of yourself and family during that period?

Ans. My children mostly.

Ques. 23. Have you contributed any to that support?

Ans. I have contributed by my own labor.

Ques. 24. Do you live with or separately from your husband?

Ans. Separately.

26 Ques. 25. About how long have you lived separately from your husband?

Ans. I think nearly six years.

Ques. 26. To what extent, if at all, has your husband contributed to your support during that period?

Ans. I cannot say to what extent; not anything near to support myself and family.

Ques. 27. Can you approximate the amount per annum he has furnished?

Ans. I could not.

Ques. 28. Have you any means of ascertaining?

Ans. No; I have not. Sometimes for months he did not contribute at all; then we had a little something, and then it was for months again that he did not contribute.

Cross-examined by Le Grand Young, of Williams & Young, for B. Young, sen.:

Ques. 1. You have stated in your direct examination that you built or made all the improvements on the lot in question; are we to understand that this was done by your own money or with that of your husband?

Ans. It was what I considered my own money, and my boys' labor done a great deal.

Ques. 2. Did your husband, Orson Pratt, contribute any of the money or means that it took to build the house and other improvements on said lot?

Ans. I don't remember that he contributed anything, unless it was some of the means that he allowed me for the support of my family.

Ques. 3. Was your husband at home during the time these improvements were made or not?

27 Ans. Only for a short time while one portion of the house was being built.

Ques. 4. What was the cost of the improvements made by you upon that lot?

Ans. It would be impossible for me to tell.

Ques. 5. Did not trustee in trust furnish the means that it took to build that house to your husband?

Ans. Not any portion that I know of.

Ques. 6. What was your own and your children's occupation prior to and at the time of the building of that house?

Ans. My own occupation was every-day labor for my family. I could not remember that of my children; they had been engaged different ways.

Ques. 7. What year were the improvements made on that lot?

Ans. Between the time I went there and went south.

Ques. 8. Was not your family quite young at that time?

Ans. Some of them were.

Ques. 9. At the time you and your husband went south, did he sell that property or any portion of it?

Ans. I never considered that he sold it. He never sold it to my knowledge; he told me positively he would not sell it.

Ques. 10. By whose permission did you move into that house on the said lot on March 12, 1868?

Ans. Brigham Young.

Ques. 11. Has there been any understanding between yourself and Brigham Young in regard to the payment of rent or purchasing the property from him?

28 Ans. There was never anything said about the rent. I never understood there was any rent to be paid.

Re-examined direct:

Ques. 1. You have stated in your cross-examination that you returned to the occupancy of that lot in 1868 by the permission of Brigham Young, sen.; state how that permission was given, and when.

Ans. I met Brigham Young and he asked me if I would like to go back to that lot. I said I should. He said that he would let me have the house and one-half of the lot back, and I could move in as soon as the family in the house got out.

Ques. 2. Did you, pursuant to that, return to the house as you have stated?

Ans. Yes, and made it my home since then.

Ques. 3. Has M'r Brigham Young, senior, or any agent of his, to your knowledge, made any claim to you, or otherwise, for the south half of said lot, since your return to it, or until the filing of this application?

Ans. No; never.

Ques. 4. Please state the respective ages of your children as near as you can.

Ans. One is 36 or 37, one is 31 or 32, one is 26, and one is 21, and one is 20 years of age, and another 16 years of age. They all do and have resided in Salt Lake City.

Re-examined cross:

Ques. 1. You have stated in your re-examination that Brigham Young, nor any of his agents, has ever laid any claim to that lot, since you moved there in 1868, to your knowledge; has Brigham

29 Young ever disclaimed that lot to your knowledge?

Ans. He has never spoken to me on that subject since that time.

SARAH M. PRATT.

HARMEL PRATT, being first duly sworn, on oath deposes and says, on the part of M'r's Sarah M. Pratt—

Interrogated by D. Cooper:

Ques. 1. Where do you reside, and what is your age?

Ans. In Salt Lake City. I am between twenty-one and twenty-two years old.

Ques. 2. Are you in any way connected with Sarah M. Pratt, and if so, in what way?

Ans. I am her son.

Ques. 3. Do you know the property occupied by your mother? If so, describe it, and state how long she has occupied it.

Ans. Yes, sir; it is the south half of lot 5, block 76, plat A. She has occupied it as her home since the 12th day of March, 1868, up to the present.

Ques. 4. Since 1868 has she lived with or separately from her husband, Orson Pratt?

Ans. She has lived separately.

Ques. 5. What family has she had living with her on that property since March 12th, 1868?

Ans. Her children, O. Pratt, junior, Laron Pratt, H. Pratt, A. Pratt, and Hermie Pratt.

Ques. 6. Who has supported the family of M'r's Pratt, who resided on that property since March, 1868?

Ans. Herself and children.

30 Ques. 7. Does Orson Pratt, senior, have any other family or families residing in Salt Lake City or elsewhere?

Ans. Yes, sir; they are residing in Salt Lake City. I think there are more than one; the number I could not state.

Ques. 8. For what purpose has that property been occupied by M'r's Pratt since March 12th, 1868?

Ans. She has occupied it as a home. When we first moved in she repaired the building which stands now on the land. The back part of the building was in danger of falling from decay. That was repaired. The roof was shingled on different branches of the house.

Ques. 9. Of what material was the house built?

Ans. Of adobies.

Ques. 10. State the general condition of the house at the time when she moved into it.

Ans. It was in a very bad condition. She made what repairs were necessary.

Ques. 11. State what you mean by saying in a very bad condition, and whether it was in whole or in part habitable.

Ques. 12. Some parts they were unable to live in on account of the leaking of the roof and decay; parts of it we could not inhabit until it was repaired.

Ques. 12. What means of support for herself and family were possessed by M'r's Pratt since 1868?

Ans. Her boys were in work at that time, and the means derived therefrom were given to her for her support and that of her family. She rented one or two rooms of the house. She had some property of her own which she sold and turned into available means.

Ques. 13. Is there an enclosure around this property?

31 Ans. Yes, sir; it is entirely enclosed by a picket and board fence. The enclosure on the north was made by Brigham Young, senior. The rest is as it was when we moved in, with the exception of the repairs made by the boys (myself and brothers).

Ques. 14. For whom did yourself and brothers make those repairs?

Ans. M'r's Pratt, my mother.

Ques. 15. Did your father, Orson Pratt, since March, 1868, make any repairs on that property?

Ans. I believe not.

Cross-examined, P. L. Williams, of Williams and Young, for Brigham Young, sen.

Ques. 1. Did you and brothers build any fences on that property since March, 1868?

Ans. There was a good deal of the east fence that was down, and we built that up, repaired the front fence, and put in a new gate or two.

Ques. 2. What was the extent of the repairs made on the roof of the house? Was there an entire new roof?

Ans. I could not tell the extent. There was one part of the house entirely shingled that I can remember.

Ques. 3. How large a part was entirely re-roofed?

Ans. I don't know that I could answer that. I don't remember.

Ques. 4. Has there, since 1868, been any improvement made on that property by your mother and family, except merely by way of repairs, and, if so, what are they?

Ans. Yes; we set out trees; we cultivated the soil each year, to what extent I could not say.

32 Ques. 5. Was not the cultivation of the soil for the purpose of raising vegetables for family use?

Ans. Yes, sir; also there were strawberry plants set out, several beds.

Ques. 6. Can you state positively and of your own knowledge that since 1868 your father has not contributed any means toward the support of your mother and her children?

Ans. I believe he has given her some means; it was not enough for the necessaries of her family of my own knowledge.

Re-examined—direct:

Ques. 1. You say that M'r Pratt has not furnished sufficient means to supply your mother's family with necessaries since March, 1868; what proportion of the necessaries of herself and that portion of her family depending upon her has he furnished?

Ans. He has furnished now and then means for some vegetables. That is about all he ever did furnish; never any clothing or wearing apparel.

HARMEL PRATT.

Subscribed and sworn to before me this 23rd day of April, A. D. 1873.

D. BOCKHOLT,
Probate Court.

ARTHUR PRATT, being first duly sworn according to law, on oath says, on the part of Sarah M. Pratt:

Ques. 1. What is your age, and where do you reside?

Ans. I am between 20 and 21 years of age, and reside in Salt Lake City.

Ques. 2. Are you related to M'r's Sarah M. Pratt? If so, how?

33 Ans. I am. She is my mother.

Ques. 3. Do you know the south half of lot 5, block 76, plat A; and, if so, state by whom it is occupied, and how long?

Ans. I do; it is occupied by my mother and her family as her home, and has been so occupied since March 12, 1868, up to the present time.

Ques. 4. How do you fix March 12, 1868, as the date from which she has occupied it?

Ans. A few days after we moved into the house I marked on the wall March 12, 1868, that being my birthday, and the day we moved in.

Ques. 5. Since 1868 has your mother lived with or separately from her husband, Orson Pratt?

Ans. She has lived separately from him.

Ques. 6. Who has been the actual head of that branch of Orson Pratt's family for the last ten years?

Ans. Mother has been.

Ques. 7. Who has supported M'r's Pratt and her family since March, 1868?

Ans. Herself and children.

Ques. 8. Does M'r Orson Pratt, sen., have any other family residing in Salt Lake City or elsewhere?

Ans. He has; he has five other families, four of which are residing in Salt Lake City at the present time.

Ques. 9. Of what members respectively are those families composed?

Ans. He considers them his wives and children, as he has introduced me to them and they go by his name.

Ques. 10. Do you know of your mother's having rented any portion of the house occupied by her since March 12, 1868; if so, to whom, and what revenue she derived from it?

34 Ans. She has rented a portion of the house to Orson Pratt, jun., for which she has received at the rate of $15 and sometimes only $12 per month for about four years; also to M'r's Beren a portion of the time she has resided there; she received from her ten dollars per month for two rooms, she was there three or four months.

Ques. 11. What means, by labor or otherwise, had her children of contributing to her and their support?

Ans. We all had employment, with which we got means for her support and our own.

Ques. 12. What means, if any, has Orson Pratt, sen., contributed to the support of your mother and her children since March, 1868?

Ans. I could not state the exact amount. He has not given her enough to support her if she had been alone. He has not provided for her clothing or any part of her family.

Ques. 13. Where has Orson Pratt, sen., himself resided since 1868, if you know?

Ans. Most of the time in Salt Lake City, with the other portion of his family.

Ques. 14. Has he at any time since March, 1868, resided with M'r's Pratt on this property?

Ans. No, he has not.

ARTHUR PRATT.

Subscribed and sworn to before me this 23rd day of April, A. D. 1873.

D. BOCKHOLT,
Probate Clerk, Salt Lake Co., U. T.

35 Upon the hearing of the matter the said district court made the following rulings as to the foregoing testimony and evidence, to wit:

The 6th and 7th interrogatories to Brigham Young, jun., witness for appellee, and the answers thereto, are ruled out as incompetent and illegal as against the appellant.

The answer of witness Hamilton G. Park to the 3rd interrogatory is ruled out as incompetent.

The 5th interrogatory to same witness and the answer thereto are also ruled out for similar reasons.

Exhibit "A," offered on the part of the appellee, being a proper written conveyance in form of a deed from Orson Pratt to Brigham Young for the lot in controversy, dated 29th day of October, 1861, is also excluded for the want of proof of its execution.

The answers of Brigham Young, sen., to 1st, 2nd, 3rd, 4th, 5th, and 6th interrogatories are ruled out as incompetent.

1st cross-interrogatory to T. W. Ellerbeck by counsel for M'r's Pratt and the answer thereto, objected to by counsel for Brigham Young, is ruled out as illegal and incompetent.

To each and every of which rulings, except the last one above mentioned, the said Brigham Young by his counsel then and there excepted.

On the 26th day of November, 1875, the said court caused to be filed in the office of the clerk thereof its findings of fact and law in the said matter, and on said day rendered its judgment and decree therein; which finding, judgment, and decree are in the words and figures following, to wit:

The said findings of fact being preceded by the following statement, viz:

36 "The court having disposed of the several objections to the evidence offered, and having excluded such portions of it as are illegal and incompetent, now proceeds upon the evidence thus expurgated to state its findings of the facts and then its conclusions of law upon the facts so found."

The court finds as facts:

First. That the lot in controversy was settled upon by Orson Pratt and Sarah M. Pratt about the year 1854, and that improvements, a house, fences, &c., were erected upon it by M'r's Pratt, and that they lived upon it until the fall of the year 1861, when they went to the southern part of the Territory.

Second. That for several years previous to 1868 Brigham Young, sen., had possession of the lot by his tenants.

Third. That in 1867, or early in 1868, the appellee, Brigham Young, sen., told the appellant that she might have back the south half of the lot in controversy, and that she could move in as soon as the family in the house got out, and that under such permission Sarah M. Pratt and her family went into possession on the 12th of March, 1868, and have occupied the lot as a home from that time.

Fourth. That Orson Pratt has not lived with his wife Sarah M. Pratt and her family since March 12th, 1868, and that he has five other families besides Sarah and her children, four of whom are residents of the city of Salt Lake.

Fifth. That Sarah M. Pratt and her children have supported themselves by their labor and means since March 12th, 1868, and that they have put improvements upon the lot by repairs to the house, fencing, setting cut trees, plants, &c.

37 Sixth. That Sarah M. Pratt has been the head of her family for ten years previous to November, 1873.

Seventh. That no rent has been claimed of or paid by said Sarah M. Pratt for said premises since she went into possession in 1868, nor by Orson Pratt or any authorized agent of his since that time.

Eighth. That Orson Pratt has not supported his wife Sarah M. Pratt and her family since March, 1868, and has contributed but a very small part towards her support.

Ninth. That the lands embracing Salt Lake City were applied for under the act of Congress on the day of , and that the entry of the same was made by the mayor of the city on the 21st of November, 1871.

Tenth. The acts of Congress and of the Territorial legislature in reference to the subject-matter will be judicially recognized, and therefore need not be stated as facts specially found by the court.

The findings of law are as follows :

First. That under the several acts of Congress upon the subject, and especially the act of 23rd May, 1844, entitled "An act for the relief of the citizens of towns upon the public lands of the United States under certain circumstances," and the act of March 2nd, 1867, entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," that the right which the individual inhabitant of the city or town took was a possession of the land with the right to the possession and use, with the right as a member of the community to have the land entered by trustee as indicated in said act of Congress at the minimum price in the proper land office of the United States, and the right
38 under such rules and regulations as might be prescribed by the proper legislative authority to have title made to himself for such lot or subdivision as he occupied or had the rightful claim of possession to at the time of the entry of the land by the trustee, &c.

Second. That this right was a statutory right enacted and existing by authority of the acts of Congress declaring, defining, and limiting it.

Third. That the basis of the right and an indispensable constituent of it is the actual occupancy of the land at the time of the entry by the trustee, or the possession, actual or constructive, or the right to the possession, at that time.

Fourth. That the occupancy at the time of the entry of the land by the trustee presumptively gives the right to the occupant of the land, but that this presumption may be impeached and overturned by proof.

Fifth. That possession being of the substance of the right, that the right may be lost by an abandonment or surrender of the possession, and that it may be transferred to another by a transfer of the possession.

Decree.

It is therefore ordered, adjudged, and decreed that the decree of the court below of the 28th of November, 1873, declaring that Sarah M. Pratt is not the legal and rightful owner and occupant of the property therein in controversy, but that the said Brigham Young, senior, is the rightful owner and occupant thereof, and entitled to a deed in fee simple thereto, and further decreeing that Brigham Young pay the sum of six dollars and fifty cents costs, and that Sarah M. Pratt pay the
39 sum of forty-four dollars and eighty-five cents costs, be and the same is reversed, set aside, and held for naught. It is further ordered, adjudged, and decreed that Sarah M. Pratt was in possession and rightful claimant of the south half of lot number five (5), block seventy-six (76), plat A, in Salt Lake City, being one hundred and sixty-five feet square, enclosed by a board fence, including the dwelling house of the said Sarah M. Pratt, at the time of the entry of the lands embraced within Salt Lake City, by the mayor of said city under the provisions of the act of Congress of March 2, 1867, entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," and that the said Sarah M. Pratt is entitled to a deed in fee simple thereto from the mayor of Salt Lake City.

It is further ordered that this judgment of the court be certified to the mayor of Salt Lake City, and that the appellee, Brigham Young, sen., pay the costs of this court and the court below.

It was thereupon, on the said 26th day of November, 1875, upon the motion of counsel for said appellee, Brigham Young, the counsel for said Sarah M. Pratt being present and consenting thereto, ordered by the court that the said Brigham Young have twenty days in which to give notice of motion for a new trial in said matter.

The party now moving for a new trial makes the following assignment of errors committed by the said court, viz:

First. The evidence is insufficient to justify the findings of fact, and the decision and decree of the court is this:

40 1st. There is no evidence sufficient to show that Sarah M. Pratt was, at the time of the entry of the land in controversy by the trustee, or at any other time, the occupant or in the possession thereof in her own right, but on the contrary, the evidence establishes that she, as the wife of Orson Pratt, was let into the possession thereof in March, 1868, and has since occupied it by permission of Brigham Young and as his tenant.

2nd. The evidence does not show that Sarah M. Pratt and her children have supported themselves as stated in the 5th finding of fact, but, on the contrary, it establishes that Orson Pratt, the husband of said Sarah, contributed to such support.

3rd. The evidence does not show that Sarah M. Pratt has been the head of her family, as found in the 6th finding of fact, but it establishes that she is the wife of Orson Pratt, and that he is the head of the said family.

4th. The evidence shows that Brigham Young claimed rent of the said Orson Pratt for the premises and land in controversy, and collected rent therefor, at least a portion of the time from March, 1868, until 1872.

Second.—Errors in law.

1st. The court erred in ruling out the portion of the testimony of Brigham Young, jun., which it did rule out.

2nd. The court erred in excluding that portion of the testimony of the witness, Hamilton G. Park, ruled out.

3rd. The court erred in excluding Exhibit A, offered in evidence by the said Brigham Young.

41 4th. The court erred in excluding that portion of the testimony of Brigham Young, senior, ruled out.

5th. The court erred in rendering its judgment and decree in favor of the said Sarah M. Pratt, for the reason that the said decree is not supported by the facts found.

6th. The court erred in denying the motion of the said Brigham Young to dismiss the said appeal from the probate court of Salt Lake County.

Dated 20th December, 1875.

WILLIAMS & YOUNG,
Attorneys for Brigham Young.

TERRITORY OF UTAH,
Salt Lake County, ss:

We, the undersigned counsel for the respective parties in the foregoing matter, do hereby certify that the foregoing statement on the motion

of the said Brigham Young for a new trial has been agreed upon and is correct. And we hereby stipulate that the said statement shall be used as and constitute the statement on appeal from the order which shall be made on the said motion and also on appeal from the judgment and decree heretofore rendered in said matter by said district court.

Dated Dec. 21st, 1875.

WILLIAMS & YOUNG,
Attorneys for Brigham Young.
D. COOPER,
Attorney for Sarah M. Pratt.

(Indorsed:) Filed December 20, 1875. William H. Betts, clerk, by Willis P. McBride, deputy clerk.

42 *Opinion of the court in rendering judgment in this matter.*

The appellant and appellee both claim under the act of Congress of March 2nd, 1867, entitled "An act for the relief of the inhabitants of cities and towns upon the public lands," and the act of the Territory of Utah of February 17th, 1869, prescribing rules and regulations for the execution of the trust arising under said act of Congress.

The relief which was designed to be granted by said act of Congress was to enable the inhabitants of cities and towns, settled upon the public lands of the United States, to secure a title to such lands from the government, by paying to the government the minimum price for such lands. As a means of doing this most conveniently, it was provided that when a city or town was incorporated the corporate authorities thereof, and when not incorporated the judge of the county court of the county in which such city or town "may be situated," should enter at the proper land office and at the minimum price the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests. These provisions created the corporate authorities of an incorporated city or town, and the judge of the county court in case the city or town was not incorporated, when the land was entered under the provisions of the act of Congress, trustees, depositories of the legal title for the inhabitants of the city or town who had settled and occupied the land, for the several use and benefit of the occupants thereof, according to their respective interests, the execution of which trust, as to the disposal of lots in such town and the
43 proceeds of the sales thereof, was to be conducted under such rules and regulations as might be prescribed by the legislative authority of the State or Territory in which the same was situate. Whatever may have been the purpose of Congress with reference to cities and towns as communities, it is evident that the leading object was to secure individual rights to the inhabitants of cities and towns who were occupants of the land embraced within the limits of the entry contemplated by said act. These individual rights flow from and are based upon the grant in the act of Congress. It confers the right, defines its character, limits its scope, and points the manner of its consummation.

The power conferred upon the Territorial legislature is to execute the trust. It has no power to interfere with the individual rights which vested or became vested under the act of Congress.

If this proposition be true, then we are to look to the act of Congress alone to determine who are entitled under it. The primal fact which gives the right to the inhabitants of the city or town as a community is that they have settled and occupied the public lands as a city or town,

and the primal fact that gives to any individual a right to any lot or subdivision of such public lands is that he or she was the occupant of such lot or subdivison. Occupancy is the central and leading idea of the grant, and upon this in a positive or qualified sense must depend any right which can be asserted under it. It is in trust for the several use and benefit of the occupants thereof according to their respective interests. The execution of this trust as to the disposal of the lots in such town, and the proceeds of the sales thereof, is to be conducted
44 under the rules and regulations prescribed by the legislative authority of the State or Territory. What these rules and regulations shall be is left to legislative discretion, limited only by the condition that they must be in furtherance of the execution of the trust and must not violate its letter or its spirit. As to rights which may accrue to individuals under the grant, the legislature can only make rules and regulations to eliminate and define and establish them. As to the rights which accrue to the community, it has the power to dispose of the proceeds of the sales. In determining what are the rights of individuals under the act of Congress, the rules and regulations adopted by the legislature could be looked to at most as only a legislative exposition or construction of the act of Congress, and could not be regarded as authoritative or binding upon the court as a legislative enactment. There being no controversy as to compliance with the rules and regulations enacted by the Territorial legislature in bringing the claims of the parties before the judge of probate in the court below, and none as to regularity of the appeal to this court, the court will not look to the act of the legislature of Feb'y, 1869, in the determination of the question at issue in this case, but will address itself to the construction of the act of Congress as the source from which whatever right may be asserted by either of the parties must flow, and as the standard by which their respective claims must be tested and determined.

It has for a long time been the settled policy of the government of the United States to encourage the actual settlement of the public lands, and it has also regarded with disfavor the entry of public lands
45 for purposes of speculation. The settlement required by law included actual occupation of the land and the subjection of the soil by labor to the beneficial use of the person proposing to enter or buy the land from the government.

The price at which the land could be bought was fixed by law, as were also the precedent conditions to a purchase. The first act of the settler was the occupancy of the land—the last was the payment of the purchase money by the entry of the land at the proper land office. Issuance of the patent followed as a sequence to the regular entry of the land.

The title to the land and the right to the title remained in the government until the entry of the land at the proper land-office.

The settler had the possession and the right to possession, and upon compliance with the prerequisites of the law he had the exclusive right to buy of the government at the price fixed by law, the entrance money or minimum price for the land. He was called a pre-emptor—one who buys before, or one who has by law a first and exclusive right to buy the land of the government.

This right of the pre-emptor depends upon the occupation of the land and its continued possession to the time of application to enter it at the proper land office. An abandonment or surrender of possession is a forfeiture of all right to enter the land.

The right of the settler upon public lands is then a possession with the right to possession, coupled with a right (the precedent conditions being complied with) to enter the land at the minimum government price. The title to the land remains in the government, and no right to a title accrues to the pre-emptor until he has entered the land.

46 Even after he has occupied the land, made his improvements, and filed his declaration of an intention to enter the land, the government can by special grant convey the land to another. The pre-emptor has no estate, legal or equitable, in the land which can be recognized or enforced in law, except such as grows out of the possession of the land.

The policy of the Federal Government with regard to public lands settled and occupied as sites of cities or towns was in the beginning the reverse of that governing as to public lands open to pre-emption.

Such lands were withdrawn from the entry and the government held them with a view to public sales to the highest bidder. This latter policy was abandoned in 1844, and since then the policy of the government has been to allow the entry of such lands at the minimum price, for the use and benefit of the occupants of the land within such city or town sites according to their respective interests.

In other words the policy which had guided the government with regard to the settlement and entry of agricultural lands was adopted by it, "mutatis mutandis," as to the inhabitants of cities and towns, the occupancy of the land in both cases being the substantial basis upon which the individual right depends. The nature and quality of the interest which each class has in the land is the same. The government holds the title, the interest of the occupants is only a possession and the right to the possession, with the right, the one as a pre-emptor and the other as member of a community, to enter or have entered the land, in other words to buy it of the government at the minimum price. This limited interest in the land is the creature of the acts of

47 Congress. It is novel and anomalous and only subject to the ordinary rules of law governing real estate (if at all) in a narrow and subordinate sense. The fee simple which is usually the largest possible estate which a man can have in land, and which draws to it all of the incidents of such an estate, such as possession, or the right of possession, and is the predicate of the relations of landlord and tenant, does not enter into or constitute any part of this statutory interest in land which is created by the acts of Congress. On the contrary, the fee is recognized as being in another, and this estate or interest in the land exists in its narrow and meager entirety, without and independent of it.

To apply to it the rules and analogies which ordinarily govern and guide in determining interest and relations in regard to real estate would be in contravention of the very nature of the right itself. The title to real estate is never in abeyance. This statutory interest vanishes upon the mere abandonment of the possession of the land. The title to real estate can only be transferred from one person to another by writing in proper form and duly attested. This interest can pass from one to another by the surrender of the possession of the land. The conclusion educed from analogies and above announced is farther strengthened and confirmed by the language of the acts of Congress in conferring this right upon the inhabitants of cities and towns.

The entry under authority of the acts of Congress, is "in trust for the several use and benefit of the occupants thereof, according to their respective interests." This phraseology points out the class who are

the beneficiaries in the trust—"occupants," and also fixes the
48 time of occupancy, the date of the entry of the land by the corporate authorities or the judge of the county court which determines the individual "cestui que trust."

Those in possession of the land when the entry is made by the probate judge are the persons for whom the land is held in trust and to whom he is to make the deeds.

This is the construction and meaning of the act of Congress. Cofield vs. McClelland, 16th Wallace, 334. The act of Congress of May 23rd, 1844, referred to in the citation just made, uses the same phraseology in referring to this subject-matter as the act of Congress of March 2nd, 1867, under which the parties in the case claim.

That this is the reasonable and just construction of the act of Congress, and that the presumption is in favor of the actual occupant at the time of entry of a lot or parcel of ground within the limits of a city or town site, settled and occupied as such upon public lands and entered under authority of the act of Congress of March 2nd, 1867, above referred to, is, in the opinion of the court, sustained by reason and authority; but out of this springs another question of general interest and necessary to the adjudication of this case, and that is whether the occupancy at the time of entry is conclusive in favor of the right of the individual occupying to the title of the land, or whether it is only presumptive, and if so, whether the circumstances in this case repel the presumption in favor of the actual occupant at the time of the entry of the land by the trustee and shows the right to the land in controversy to be in another. The act of Congress of March 2nd, 1867, confers upon the State or Territorial legislature the execution of the trust "as
49 to the disposal of the lots in such town," &c., "under such rules and regulations as may be prescribed," &c. This must be done according to the respective interests of the occupants. Does this language, "respective interests," apply to the topographical area and measurement of the lots occupied? Or is it to be construed in a larger sense, as embracing the nature of the occupancy and the quality of interest in the land which the occupant claims as well? The legislature has construed this language in the larger and more comprehensive sense. By sec. 3 of the act of the legislature of Utah, entitled "An act prescribing rules and regulations for the execution of the trust arising under the act of Congress of March 2nd, 1867," it is enacted that each and every person, or association, or company of persons, or corporation, claiming to be the rightful owner of possession, occupant or occupants, or to be entitled to the occupancy or possession of such lands, or to any lot, block, share, or parcel thereof shall within six months, &c., &c., sign a statement in writing, &c.

These are the persons and these the interests which the legislature regarded as entitled to claim and assert title to lots or parcels of land in any city or town in the Territory under this act of Congress. It is manifest that it was the design of the legislature to extend the benefits of the act of Congress to two classes of persons, actual occupants and the rightful claimants or owners of possession entitled to the occupancy, or possession.

This legislation, in the opinion of the court, was in harmony with the act of Congress, and within the authority conferred by the act of Congress upon the Territorial legislature, and the construction given
50 by the legislature to the act of Congress in this particular is adopted by the court.

An application of the conclusions of law to the facts as found by the court will readily determine the rights of the parties in this case.

The appellant, Sarah M. Pratt, was in possession of the lot in controversy, occupying it as a home at the time of the entry of the land on which the city of Salt Lake is situate by the trustee under the act of Congress.

This gave to her a prima-facie right to a title from the trustee. Is this right repelled by the proof and a right established in the appellee, Brigham Young? Sarah M. Pratt and her husband, Orson Pratt, occupied the lot for some years previous to 1861, and he put improvements upon it. They then left it, and afterwards, some several years before 1868, Mrs. Pratt came back to the city of Salt Lake and, according to the testimony of both the appellant and appellee, the appellee gave her the possession of the lot. There was no qualification of this surrender of possession at the time, no reservation of rent or any agreement of any kind showing or tending to show that there was any reservation of the possession by the appellee. No rent was ever paid by or claimed of the appellant, and she has had the continuous possession from the 12th of March, 1868, occupying it as a home for herself and her family.

There was an effort made to prove that Orson Pratt paid rent for the premises to the appellee, but in this (even if appellee would have been bound by it) there is a failure. There is no proof that Orson
51 Pratt ever paid rent for the premises, or ever knew that any was paid, or that any authorized agent of his ever paid rent for him.

Upon this state of the case it is the opinion of the court that there is no sufficient proof in this case to repel the presumptive right of Sarah M. Pratt to a title to the lot in controversy as the occupant thereof at the date of the entry of the land by the trustee under the act of Congress.

(Title.)

Notice of motion for new trial.

To Messrs. D. Cooper and Harmel Pratt, attorneys for the said applicant and appellant, Sarah M. Pratt:

Take notice that the said applicant, Brigham Young, on the 26th day of December, 1875, at the court-rooms of said court, in the Federal court-house in Salt Lake City, in said county and Territory, at the hour of 10 o'clock a. m., on that day, or as soon thereafter as counsel can be heard, will move this court to set aside and vacate the decision, judgment, and decree heretofore rendered and entered in said matter on the 26th day of November, 1875, whereby it is decreed that the said Sarah M. Pratt is entitled to a deed in fee-simple from the mayor of Salt Lake City of the said south half of lot 5, block 76, plat A, of said city, and to grant a new trial therein.

Said motion will be based upon the following grounds, to wit:

1st. Insufficiency of the evidence to justify the findings of fact of the said court, and the decision and decree therein rendered; and that the said decree and decision is against the law.

52 2d. Error in law occurring at the trial and excepted to by the said applicant, Brigham Young, dated December 15th, 1875.

WILLIAMS & YOUNG,
Attorneys for Brigham Young.

Copy of this notice served on us this 15th day of December, 1875.

D. COOPER,
Attorney for Mrs. Pratt.

(Indorsed:) Filed December 21st, 1875. W'm H. Betts, clerk, by Willis P. McBride, deputy clerk.

TUESDAY, *Dec. 21st, A. D.* 1875.

Court met pursuant to adjournment, and was opened for business in due form. Present, Hon. Alexander White and the officers of the court.

SARAH M. PRATT }
vs.
BRIGHAM YOUNG. }

Upon motion of defendant's counsel for a new trial, after consideration of the court, it is ordered that said motion be overruled.

(Title.)

Notice of appeal to supreme court.

Please take notice that the applicant, Brigham Young, above named, hereby appeals to the supreme court of Utah Territory from the judgment and decree made and entered in the said matter in the district court on the 26th day of November, 1875, in favor of the said
53 Sarah M. Pratt and against the said Brigham Young; and also that the said Brigham Young hereby appeals to the said supreme court from the order made and entered in the said matter in the said district court on the 21st day of December, 1875, refusing a new trial therein.

BRIGHAM YOUNG,
By WILLIAMS AND YOUNG,
His Attorneys.

To the clerk of said district court, and to D. Cooper, esq., attorney for Sarah M. Pratt.

Service of a copy of the within notice admitted this 18th day of February, A. D. 1876.

D. COOPER,
Attorney for Sarah M. Pratt.

(Indorsed:) Filed February 18th, 1876. W'm H. Betts, clerk, by Willis P. McBride, deputy clerk.

(*Title.*)

Undertaking on appeal.

Whereas the said Brigham Young, one of the applicants in the above matter, has appealed to the supreme court of said Territory from a judgment and decree made and entered against the said Brigham Young and in favor of the said Sarah M. Pratt in said matter, in the said district court, on the 26th day of November, 1875; and whereas the said Brigham Young has also appealed to said supreme court from the order made and entered in the said matter in the said district court on the 21st day of December, 1875, refusing a new trial:

54 Now, therefore, in consideration of the premises and of the said appeals, we, the undersigned, W'm H. Folsom, Orson P. Arnold, and Robert R. Anderson, all of Salt Lake City and

County, in said Territory, do hereby jointly and severally undertake and promise on the part of the appellant, the said Brigham Young, that the said appellant will pay all damages and costs which may be awarded against him on the said appeals, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

BRIGHAM YOUNG. [SEAL.]
W. H. FOLSOM. [SEAL.]
O. P. ARNOLD. [SEAL.]
R. R. ANDERSON. [SEAL.]

TERRITORY OF UTAH,
Salt Lake County, ss:

Robert R. Anderson, W'm H. Folsom, and Orson P. Arnold, the sureties named in, and who have executed, the foregoing undertaking, being duly sworn, each for himself deposes and says that he is worth the sum of three hundred dollars over and above all his just debts and liabilities, exclusive of property exempt from execution.

55

R. R. ANDERSON.
O. P. ARNOLD.

Subscribed and sworn to before me this 19th day of February, A. D. 1876.

[NOTARIAL SEAL.]

JAMES JACK,
Notary Public.

(Indorsed:) Filed February 19, 1876. W'm H. Betts, clerk, by Willis P. McBride, deputy clerk.

TERRITORY OF UTAH,
Salt Lake County, ss:

We, the undersigned, counsel for the respective parties to the above matter, do hereby certify that the foregoing printed transcript of fifty-five contains full, true, and correct copies of the papers used upon the hearing of the said matter in the district court, and upon the hearing of appellant's motion for a new trial, and that it includes the pleadings, statement on motion for a new trial and on appeal, the notice and undertaking on appeal, opinion of the district court, and the order denying the appellant's motion for a new trial.

WILLIAMS & YOUNG,
Atty's for Appellant, Brigham Young.
D. COOPER,
Att'y for Respondent.

SALT LAKE CITY, *Apr.* 15th, 1876.

(Indorsed:) In the supreme court of the Territory of Utah. Sarah M. Pratt vs. Brigham Young. Record on appeal from the third judicial district court of the Territory of Utah. Filed April 15th, A. D. 1876. Cha's A. Gould, clerk, by H. A. Gould, deputy clerk.

56 District court, 3d judicial dist., Salt Lake County.

In the matter of the application of Brigham Young and Sarah M. Pratt for deed in fee-simple to the south half of lot 5 in block 67, plot A, Salt Lake City.

It is hereby stipulated between counsel for the respective parties in the above matter that the same shall be tried upon the evidence con-

tained in the record certified from the probate court of Salt Lake County upon the appeal of the said Sarah M. Pratt, subject to the exceptions to the evidence contained therein; and that the case shall be submitted the court to give its rulings upon questions of the legality, competency, materiality, and relevancy of evidence, as well as upon findings of fact, at the conclusion of the case.

WILLIAMS & YOUNG,
Att'y for Brigham Young.
D. COOPER,
Att'y for M'r's Pratt.

(Indorsed:) Sarah M. Pratt vs. Brigham Young. Filed June 19th, A. D. 1876. Cha's A. Gould, cl'k, by H. A. Gould, dep'ty clerk.

57 At a term of the supreme court in and for the Territory of Utah, began and held at Salt Lake City, in the county of Salt Lake, in said Territory, on the 5th day of June, A. D. 1876,

Present and presiding, Hon. Michael Schaeffer, chief justice; Hon. Phillip H. Emerson, associate justice; Hon. Jacob S. Boreman, associate justice.

Among the records and proceedings of said court were the following, to wit:

WEDNESDAY, *June 21st*, 1876.

The supreme court in and for the Territory of Utah met this day pursuant to adjournment, at the hour of ten o'clock a. m.

The court was duly opened.

SARAH M. PRATT, RESPONDENT,
vs.
BRIGHAM YOUNG, APPELLANT.

An appeal from the 3d dist. court.

This cause came on to be heard on the transcript of record from the dist. court of the 3d judicial dist. of the Territory of Utah, D. Cooper, esq., appearing for the respondent, and Mess'rs Williams & Young appearing for the appellant.

Whereupon, after argument, the same was submitted, and by the court taken under advisement.

58 THURSDAY, *July 6th*, 1876.

The supreme court in and for the Territory of Utah met this day, pursuant to adjournment, at the hour of ten o'clock a. m.

The court was duly opened.

SARAH M. PRATT, RESPONDENT,
vs.
BRIGHAM YOUNG, APPELLANT.

Appeal from 3d dist. court.

This cause having been heretofore argued at the present June term of this court by the respective counsel for the respondent and appellant and to the court submitted, and the court being in all things fully advised in the premises, it is by the court ordered and adjudged that the judgement of the court below be, and the same is hereby, affirmed with costs.

SARAH M. PRATT, RESPONDENT,
vs.
BRIGHAM YOUNG, APPELLANT.

This day, in open court, the counsel of Sarah M. Pratt being present, P. L. Williams, esq., of counsel for Brigham Young, petitioned the court for the allowance of an appeal to the Supreme Court of the
59 United States from the said decree and order, which petition is thereupon by the court allowed, and the bond on appeal is by the court fixed at $300.00, and it is ordered that upon the due execution and approval of the said bond within the time required by law, the same operates as a supersedeas.

Whereupon the said counsel named James T. Little and Lewis S. Hill as sureties on said bond.

60 *Opinion.*

Supreme court of the Territory of Utah. June term, A. D. 1876.

SARAH M. PRATT, RESPONDENT,
vs.
BRIGHAM YOUNG, APPELLANT.

Appeal from 3d dist. court.

Opinion by M. Schaeffer, chief justice.

This proceeding was originally instituted in the probate court of Salt Lake County, under the act of the legislature of the Territory of Utah, approved February 17, 1869, entitled "An act prescribing rules and regulations for the execution of the trust arising under an act of Congress," &c., both parties, appellant and respondent, claiming title to the half lot in controversy by virtue of the act of Congress entitled "An act for the relief of the inhabitants of cities and towns upon the public lands." In the probate court it was adjudged that the appellant was entitled to said half lot. From this judgment an appeal was taken to the 3d district court of this Territory by the respondent, and on the trial in such district court the judgment of the probate court was reversed and for naught declared, and a judgment rendered to the effect that the respondent, Sarah M. Pratt, was justly entitled to said half lot.

Appellant now brings this cause here by appeal from the judg-
61 ment of the district court and assigns for error:

1st. That the court erred in overruling respondent's motion to dismiss the appeal. We think the appeal from the probate court was properly taken, and there was no error in overruling the motion to dismiss.

The 2nd and main error assigned is, that "the court erred in its findings and judgement under the evidence," by which we understand the att'ys of the appellant to mean, that the evidence does not support the findings, and that the judgement is against the law. Section 2387 of the Revised Statutes of the United States, which is part of the act of Congress, approved March 2d, 1867, provides that, "Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site, not subject to entry under the agricultural pre-emption law, it is lawful, in case such town be incorporated, for the corporate authorities thereof to enter at the proper land-office, and at the minimum price,

the land so settled and occupied, in trust for the several use and benefit of the occupants thereof according to their respective interests; the execution of which trust, as to the disposal of the lots in such town,
62 and the proceeds of the sale thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the town may be situated."

Under this act of Congress the lot in question was entered by the mayor of Salt Lake City. He is therefore the trustee who holds the legal title in trust for the cestui que trust, i. e., he holds the lot "for the several use and benefit of the occupants thereof according to their respective interests." In this particluar case two things must concur to give the right to the title to the lot in controversy to either of the contestants: First, there must have been a town or city, with resident occupants, on the public lands, duly incorporated, to secure the title from the National Government. This is conceded, and therefore the legal title is in the mayor as the representative of such town or city. If there is no proper cestui que trust as provided by the aforesaid act of Congress, then the mayor holds the title for the benefit of the corporation; but if there be an actual occupant of such lot at the time of the entry by the mayor, then he, the occupant, becomes the legal cestui que trust and the mayor holds the legal title for his benefit. There must
63 therefore be, secondly, an actual bona fide occupancy by the individual who is entitled to such benefit, and when there is more than one of such occupants, then the title is held in trust, for the use and benefit of such occupants, according to their respective interests. Whilst this act of Congress confers certain rights and privileges upon the aggregate inhabitants of the town or city thus located upon public lands, it is nevertheless apparent that the primary object was to secure the individual rights to the respective inhabitants of the towns and cities, who were also the respective occupants of the several lots or parcels of land claimed by them.

The power conferred by this act of Congress upon the Territorial legislature is to make regulations for the execution of the trust. It has no power to interfere with or to modify the rights conferred by the act of Congress; and if the Territorial legislature, by its act approved Feb'y 17, 1869, entitled "An act prescribing rules and regulations for the execution of the trust arising under an act of Congress," &c., undertook to confer rights upon persons, associations, or corporations other than those mentioned in the act of Congress, such attempts to confer such
64 rights is simply void.

We can readily conceive of a case where an individual was, prior to the entry by the mayor, in the actual bona-fide occupancy of a lot, and where he was wrongfully ousted by an intruder or trespasser before such entry was made, in which case we think the original bona-fide occupant should receive the legal title thereto, notwithstanding the wrongful occupancy by the other at the time of the entry; but we do not understand that the act of Congress in any case confers the right to the title of any lot upon any individual who was never the personal occupant of such lot. But suppose that the Territorial legislature, by its act approved Feb. 17, 1869, conferred the right to the title of the half lot in controversy upon persons claiming to be the rightful owner of possession, occupant or occupants, or to be entitled to the occupancy or possession of such lot; and supposing that such legislation is in harmony with or justified by the act of Congress above referred to (which we only admit for the purpose of the argument), what are the respective rights of the parties herein to the half lot in controversy?

It is clearly shown by the evidence that the respondent, Sarah M. Pratt, occupied this lot from 1854 to 1861, and that during
65 that time she made valuable improvements thereon, and that in 1861 she, with her husband and family, went south in this Territory, and remained there until 1867; that during the time she was south, as aforesaid, the said lot was occupied by some of the family of the appellant by virtue of a purchase by appellant from the husband of respondent; that on the 12th of March, 1868, she, the respondent, with her children, with and by the consent of appellant, resumed the actual possession of the said half lot, made valuable improvements thereon, and continued to occupy the same from thence hitherto; that Orson Pratt, the husband of respondent, has not lived with respondent and her family since March 12th, 1868; and that he had five other families, with some of whom he is supposed to have resided; and that the respondent and her children have supported themselves since 1868, with very little, if any, aid from the said Orson Pratt. It also appears from the evidence that the possession of the said half lot was freely and voluntarily given to respondent in 1868, without any contract for rent, or any understanding or agreement, expressed or implied, that she should
66 become or be the tenant of appellant or any one else, at will or otherwise (even if that were possible under the peculiar circumstances of the case, which, we think, is not the fact).

Whatever interest the appellant had in the premises on or before March 12th, 1868, vanished upon the abandonment or surrender of the possession to respondent; and she being, for the purposes of this proceeding, the head of her family and actually occupying the said half lot as the residence and home of herself and family from the 12th of March, 1868, until long after the entry made by the mayor of Salt Lake City, she is, in our opinion, entitled to a deed for the same. The admission or rejection of the evidence which the court below declined to consider does not affect the status of the case; and if it had been admitted as competent by the district court, and if the court had given it all the force which could reasonably be claimed for it, the appellant would not, in our opinion, be entitled to the half lot in controversy. The judgement of the court below must therefore be affirmed.

67 It is ordered and adjudged and decreed that the findings and judgement of the 3d district court rendered in this cause be, and the same is hereby, approved and affirmed, and that the appellant, Brigham Young, pay the costs of this court.

(Indorsed:) Opinion of court. Pratt vs. Young. Filed July 6th, A. D. 1876. C. A. Gould, cl'k, by H. A. Gould, dep'ty clerk.

68 Know all men by these presents that we, Brigham Young, as principal, and Lewis S. Hills and James T. Little, as sureties, all residents of Salt Lake City, in the Territory of Utah, are held and firmly bound unto Sarah M. Pratt in the full and just sum of five hundred (500) dollars, to be paid to the said Sarah M. Pratt, her certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this seventeenth day of July, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately, at a supreme court of the Territory of Utah, in a suit depending in said court, to wit, in the matter of the applications of Sarah M. Pratt and Brigham Young for deeds in fee-simple from the mayor of

Salt Lake City for the south half of lot 5, block 76, plat A, Salt Lake City survey, a judgment and decree was rendered against the said Brigham Young, and awarding the title thereof to the said Sarah M. Pratt, and the said Brigham Young having obtained and taken an ap-
69 peal from the said judgement and decree to the Supreme Court of the United States and has procured a citation, directed to the said Sarah M. Pratt, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Brigham Young shall prosecute his said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

BRIGHAM YOUNG. [SEAL.]
J. T. LITTLE. [SEAL.]
LEWIS S. HILLS. [SEAL.]

TERRITORY OF UTAH,
Salt Lake County, ss:

Lewis S. Hills and James T. Little, being each duly sworn, on his oath deposes and says that he is a resident of Salt Lake City, in said Territory, and that he is worth the sum of five hundred dollars over and above his debts, liabilities, and property exempt from execution.

J. T. LITTLE.
LEWIS S. HILLS.

Subscribed and sworn to before me this 17th day of July, A. D. 1876.

M. SCHAEFFER,
Chief Justice Sup. C't U. T.

(Indorsed:) Young vs. Pratt. Bond on appeal. Approved this 17th day of July, A. D. 1876. M. Schaeffer, chief justice sup. court U. T. Filed in office of clerk of sup. court of U. T. July 17th, A. D. 1876. Cha's A. Gould, clerk, by H. A. Gould, dep'ty clerk.

69½ In supreme court.

TERRITORY OF UTAH,
Salt Lake County, ss:

Afterwards, to wit, on the 18th day of August, A. D. 1876, came the appellant, by his counsel, E. D. Hoge and Williams & Young, and filed in the office of the clerk of said supreme court of Utah Territory an assignment of errors, which is in the words and figures following, to wit:

70 *Assignment of errors and prayer of reversal.*

In the Supreme Court of the United States.

BRIGHAM YOUNG, APPELLANT,
vs.
SARAH M. PRATT, APPELLEE.

The said appellant assigns the following errors committed by the supreme court of the Territory of Utah in this cause, to wit:

First. The said court erred in adopting the findings of fact made by the district court of the third judicial district of said Territory, in this:

1st. The evidence does not show that the said appellee was at the

time of the entry of the land in controversy by the trustee, or at any other time, the occupant or in the possession thereof in her own right; but, on the contrary, the evidence establishes that the said appellee, as the wife of Orson Pratt, was let into the possession thereof in March, 1868, and has since occupied it by permission of the said appellant and as his tenant.

2nd. The evidence does not show that the appellee and her children have supported themselves as stated in the fifth finding of fact; but, on the contrary, it establishes that Orson Pratt, the husband of said appellee, contributed to such support.

3d. The evidence does not show that the said appellee has been the head of her family, as stated in the sixth finding of fact; but it
71 establishes that she is the wife of Orson Pratt, and that he is the head of the said family.

4th. The evidence shows that the appellant claimed rent of the said Orson Pratt for the use of the premises in controversy while the said appellee and her children were living on the same, and that he collected rent therefor a portion of the time, from March, 1868, until 1872.

Second. The said supreme court of said Territory erred in affirming the judgment and decree of the said district court in this cause, in this:

1st. The said district court erred in ruling out the sixth and seventh interrogatories put to Brigham Young, j'r, a witness on the part of said appellant, and the answers of said witness thereto.

2nd. The said district court erred in excluding and ruling out the answer of Hamilton G. Park, a witness on the part of appellant, to the third interrogatory put to him, and also in ruling out the fifth interrogatory put to the same witness, and his answer thereto.

3d. The said district court erred in ruling out Exhibit A, offered in evidence by the said appellant.

72 4th. The said district court erred in ruling out the answers of Brigham Young, a witness on his own behalf, to the first, second, third, fourth, fifth, and sixth interrogatories put to him.

5th. The said district court erred in rendering its judgment and decree in favor of the appellee, for the reason that the said decree is not supported by the facts found.

6th. The said district court erred in denying the motion of the said appellant to dismiss the appeal taken by the said appellee in said cause from the probate court of Salt Lake County, and in refusing to dismiss the said appeal.

Wherefore the said appellant prays that the judgment and decree of the said supreme court of the Territory of Utah be reversed, and that a mandate be issued from this court directing the said supreme court to reverse the said judgment and decree of the said district court, and directing the said district court to dismiss the appeal herein taken from the probate court of Salt Lake County.

E. D. HOGE AND
WILLIAMS & YOUNG,
Counsel for Appellant.

(Indorsed:) Sup. court of Utah. Brigham Young vs. Sarah M. Pratt. Assignment of errors. Filed in my office Aug. 18, 1876. E. T. Sprague, clerk of sup. court Utah Ter'y.

73 In the matter of the applications of Sarah M. Pratt and Brigham Young for deeds from the mayor of Salt Lake City for the south half of lot 5, block 76, plat A, Salt Lake City survey.

BRIGHAM YOUNG, APPELLANT,
vs.
SARAH M. PRATT, APPELLEE.

TERRITORY OF UTAH,
Salt Lake County, ss:

H. B. Clawson, being duly sworn, on his oath says that he is over twenty-one years of age; that he does now, and has for many years, resided in Salt Lake City, in said county and Territory. He further says that he is acquainted with the value of real estate in said city; that the south half of lot 5 in block 76, plat A, of said city, the property in controversy in the above-entitled matter, is worth eight thousand dollars; and further the deponent says not.

H. B. CLAWSON.

Subscribed and sworn to before me this 23d day of August, 1876.

E. T. SPRAGUE,
Clerk Supreme Court Utah Territory.

(Indorsed:) Brigham Young, appellant, vs. Sarah M. Pratt, appellee. Affidavit of H. B. Clawson. Filed August 23d, 1876. E. T. Sprague, clerk supreme court Utah Territory.

74 UNITED STATES OF AMERICA,
Territory of Utah, City and County of Salt Lake, ss:

I, Ezra T. Sprague, clerk of the supreme court in and for the Territory of Utah, in pursuance of said appeal, hereby certify that the foregoing is a full, true, and correct transcript of the papers, records, and proceedings in this cause on file and of record in my office, and a full, true, and correct copy of the original opinion, affidavit of value of property, and assignment of errors, also on file in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, in Salt Lake City, in said Territory of Utah, this 24th day of August, A. D. 1876.

[SEAL.]

E. T. SPRAGUE,
Clerk Supreme Court Utah Territory.

75 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, greeting:

Because in the record and proceedings, as also in the rendition of the judgment and decree, in a plea which is in the said supreme court of the Territory of Utah before you, between Sarah M. Pratt and Brigham Young, in the matter of the applications of the said Sarah M. Pratt and Brigham Young for deeds in fee-simple from the mayor of Salt Lake City for the south half of lot 5, block 76, plat A, Salt Lake City survey, manifest error hath happened, to the great damage of the said Brigham Young, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if
76 judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with

all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, and the seal of the supreme court of the said Territory of Utah, the seventeenth day of July, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.]

CHA'S A. GOULD,
Clerk of the Supreme Court of Utah Territory,
By H. A. GOULD,
Dep'y Cl'k.

(Indorsed:) Young vs. Pratt. Writ of error. Filed in office of cl'k of sup. court of U. T. July 17th, A. D. 1876. Cha's A. Gould, clerk, by H. A. Gould, dep'ty clerk.

77 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Sarah M. Pratt, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Utah, wherein Brigham Young is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment and decree rendered aginsta the said plaintiff in error, as in the said writ mentioned, should not be cerrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Michael Schaffer, chief justice of the supreme court of the Territory of Utah, this seventeenth day of July, in the year of our Lord one thousand eight hundred and seventy-six.

M. SCHAEFFER,
Chief Justice of the Supreme Court of Utah Territory.

78 TERRITORY OF UTAH,
Salt Lake County, ss:

On this the 22nd day of July, A. D. 1876, personally appeared before me Parley L. Williams, of lawful age, and being by me duly sworn, on his oath deposes and says that he delivered a true copy of the within citation to David Cooper, esq., the attorney of record of the said defendant in error, Sarah M. Pratt, on the 20th day of July, A. D. 1876.

M. SCHAEFFER,
Chief Justice of the Supreme Court of Ter. of Utah.

(Indorsed:) Young vs. Pratt. Citation. Filed in office of clerk of sup. court of U. T. July 22nd, 1876. Cha's A. Gould, clerk, by H. A. Gould, dep'ty cl'k.

79 In the matter of the several applications of Sarah M. Pratt and Brigham Young for deeds from the mayor of Salt Lake City for the south half of lot 5, block 76, plat A, Salt Lake City survey.

BRIGHAM YOUNG, PLAINTIFF IN ERROR,
vs.
SARAH M. PRATT, DEFENDANT IN ERROR.

Whereas counsel for the said plaintiff in error entertain doubts whether, under the practice and the law, the above-entitled matter is removed from the supreme court of Utah Territory to the Supreme Court of the United States by appeal or by writ of error, and have in consequence thereof sued out the writ of error herein and also taken an appeal to the said Supreme Court of the United States:

Now, therefore, it is hereby stipulated and agreed by and between the said plaintiff and defendant in error, acting by their respective attorneys herein, that the transcript of the record in said matter, filed in the office of the clerk of the Supreme Court of the United States, upon the said appeal, may be used as and constitute the record upon the
80 said writ of error in said court.

Signed at Salt Lake City, Utah, this 23d day of August, A. D. 1876.

WILLIAMS & YOUNG,
Att'ys for Pl'ff in Error.
D. COOPER,
Atty for Def't in Error.

(Indorsed:) Brigham Young, pl'ff in error, vs. Sarah M. Pratt, def't in error. Stipulation. Filed August 23d, 1876. E. T. Sprague, clerk supreme court Utah T'y.

81 Know all men by these presents that we, Brigham Young, as principal, and Lewis S. Hills and James T. Little, as sureties, all residents of Salt Lake City, in the Territory of Utah, are held and firmly bound unto Sarah M. Pratt in the full and just sum of five hundred (500) dollars, to be paid to the said Sarah M. Pratt, her certain attorneys, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this seventeenth day of July, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately at a supreme court of the Territory of Utah, in a suit depending in said court, to wit, in the matter of the application of Sarah M. Pratt and Brigham Young for deeds in fee-simple from the mayor of Salt Lake City, for the south half of lot 5, block 76, plat A, Salt Lake City survey, between the said Sarah M. Pratt and Brigham Young, a judgment and decree was rendered against the said Brigham Young, and the said Young having obtained a writ of error from the Supreme Court of the United States and filed a copy thereof in the clerk's
82 office of the said supreme court of Utah Territory to reverse the said judgment and decree in the aforesaid suit, and a citation to the said Sarah M. Pratt citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now the condition of the above obligation is such that if the said Brigham Young shall prosecute his said appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

BRIGHAM YOUNG. [SEAL.]
J. T. LITTLE. [SEAL.]
LEWIS S. HILLS. [SEAL.]

TERRITORY OF UTAH,
Salt Lake County, ss:

Lewis S. Hills and James T. Little, being each duly sworn, on his oath deposes and says that he is a resident of Salt Lake City, in said Territory, and that he is worth the sum of five hundred dollars over and above his debts, liabilities, and property exempt from execution.

J. T. LITTLE.
LEWIS S. HILLS.

Subscribed & sworn to before me this 17th day of July, A. D. 1876.

M. SCHAEFFER,
Chief Justice Sup. C't U. T.

(Endorsed:) Brigham Young vs. Sarah M. Pratt. Bond in error. Approved this 17th day of July, A. D. 1876. M. Schaeffer, chief justice sup. c't U. T. Filed in office of clerk of sup. court of U. T. July 17th, A. D. 1876. Cha's A. Gould, clerk, by H. A. Gould, dep'ty clerk.

83 UNITED STATES OF AMERICA,
Territory of Utah, City and County of Salt Lake, ss:

I, Ezra T. Sprague, clerk of the supreme court in and for the Territory of Utah, hereby certify that, in obedience to the commands of the writ of error hereto attached, I return said original writ; with the original citation thereon issued, and affidavit of the service thereof written thereunder, copy of the bond on said writ and copy of a stipulation on file in my office with the endorsements on each thereof, and I further certify that such copies are full, true, and correct copies of such stipulation and bond, and of said endorsements thereon.

In testimony whereof I have hereto set my hand and affixed the seal of said court, at Salt Lake City, in said Territory of Utah, this 24th day of August, A. D. 1876.

[SEAL.]

E. T. SPRAGUE,
Clerk Supreme Court Utah Territory.

(Indorsement on cover:) No. 183. Brigham Young, plaintiff in error, vs. Sarah M. Pratt. Utah Terr'y sup. court. Filed 4th October, 1876.

REC. 183—4

IN THE

Supreme Court of the United States.

BRIGHAM YOUNG,
Plaintiff in Error and Appellant,

vs.

SARAH M. PRATT,
Defendant in Error and Appellee.

No. 183,
October Sessions,
1878.

Error and Appeal from the Supreme Court of the Territory of Utah.

BRIEF OF THE PLAINTIFF IN ERROR AND APPELLANT.

CONTENTS.

		Page.
I.	Statement showing how the case arose,	1
II.	History of the Case,	2
III.	Assignments of Errors	7–10
IV.	Brief of Argument,	14

SHEEKS & RAWLINS,
WILLIAMS & YOUNG,
Salt Lake City.

J. RODMAN PAUL,
GEORGE W. BIDDLE,
Philadelphia,
of Counsel with the Appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

WRIT OF ERROR AND APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIGHAM YOUNG,
Plaintiff in Error and Appellant.

vs.

SARAH M. PRATT,
Defendant in Error and Appellee.

Sessions 1876.

No. 183.

STATEMENT SHOWING HOW THE CASE AROSE.

This was a proceeding instituted by Sarah M. Pratt and Brigham Young, to obtain deeds, in fee simple, from the Mayor of Salt Lake City, for the south half of lot five (5) block 76, plat A, Salt Lake City Survey. These proceedings originated in the Probate Court of Salt Lake County in the Territory of Utah, under an Act of the Legislature of that territory, approved February 17, 1869 (Compiled Laws, p. 379),

which was passed for the purpose of prescribing rules and regulations for the execution of the trust arising under the Act of Congress of March 2, 1867, entitled "An Act for the "relief of the inhabitants of cities and towns upon the public "lands." (Revised Statutes, sec. 2,387.)

For a full statement of both of these acts, this Court is referred to the brief of the plaintiffs in error in the case of *Stringfellow, et al.* vs. *Cain*, page 1, et seq. The latter case immediately precedes the present upon the list of this Court, and the proceedings here are precisely similiar to those in that case.

On the 12th of January, A. D. 1872, Brigham Young and Sarah M. Pratt, each filed their declaratory statements in the Probate Court of the County of Salt Lake, claiming to be the rightful owners of Lot 5, Block 76, Plat A, Salt Lake City Survey (Record, p. 2). Subsequently, Sarah M. Pratt filed a disclaimer of any interest or title in the north half of the said lot. (Record, p. 5.)

The Probate Court of the Territory of Utah decided that Brigham Young was entitled to the property in controversy (Record, page 1). This decision was reversed, upon appeal, by the District Court, who decreed that Sarah M. Pratt should have been awarded the half lot. (Record, page 18–25.) The decree and the findings of fact and law of the District Court were approved and affirmed, upon appeal, by the Supreme Court of the Territory of Utah (Record, p. 29), and from this decree of the Supreme Court of the Territory, this appeal and writ of error have been taken to this Court (Record, page 31) by Brigham Young.

HISTORY OF THE CASE.

Prior to the year 1861, Orson Pratt, a prominent member of the Mormon Church, and citizen of Salt Lake City, Utah,

occupied the south half of Lot 5, Block 76, Plat A, of Salt Lake City Survey. He resided with his wife Sarah M. Pratt, the appellee, in an adobe house which he had erected upon the premises. Other improvements (such as the setting out trees, the building of fences, etc) had also been made upon the lot by himself and wife. The Pratts were the first occupants of the lot after the settlement of the country. (12.)

In 1861, Pratt and his family abandoned the lot, Sarah M. Pratt leaving the city and going to the South of the Territory. (12.)

Prior to their departure, Pratt sold the lot to Brigham Young, for the sum of four thousand dollars, and gave to him a deed or transfer for the same, which was duly recorded. (5, 9.)

Young took possession of the half lot, and retained undisputed dominion over it, at least, until the year 1868, permitting his son, Brigham Young, Jr., to occupy the house. (3, 10.)

In March, 1868, Sarah M. Pratt returned to Salt Lake City, and was *permitted* by Brigham Young (according to her own testimony) to occupy the old house and surrounding ground. (12.)

There she continued to reside with her children and certain boarders, until the filing of her declaratory statement and claim for the half Lot 5, in January, 1872.

Since her return from the South, Sarah M. Pratt had been living apart from her husband, Orson Pratt, but he continued to render her occasional assistance, and no legal separation appears to have taken place. (13, 15, 17.)

The above facts are undisputed, and the only question raised by the record is, who was the true *occupant* under the meaning of the Townsite Act, at the date of the entry of the Mayor of Salt Lake City, in November, 1871. (19.)

On the one hand it is shown that Brigham Young was the occupant through his tenant Orson Pratt, who paid him rent for the premises and permitted his wife to live upon the half lot.

While on the other hand, this tenancy is denied by Sarah M. Pratt, who claims to hold the land independent of her husband and of Brigham Young.

The evidence produced before the Probate Court clearly showed that Brigham Young had received rent from Orson Pratt for the half lot, after Mrs. Pratt's occupancy of it in 1868. But all the testimony upon this point was ruled out as irrelevant by the higher Courts. This testimony was as follows:

On page 3 of the Record, Brigham Young, Jr., was asked:

"Ques. 6. State whether or not you have ever been an "agent for your father, Brigham Young, in relation to his real "property, and if so, at what time?

"Ans. During the year 1872 I was such agent.

"Ques. 7. State whether or not, during that time, you "ever received as such agent, from Orson Pratt, Sen., any "rent for the occupation of that lot, or any portion of it; "and if so, state the amount?

"Ans. I did receive rent from his reputed agent for the "occupation of a portion of said lot, the amount being fifty "dollars per month, which I received twice for two months "rent."

This testimony was ruled out by the District Court, and the ruling was affirmed by the Supreme Court. (Fifth Assignment of Error.)

Hamilton Park, the real estate agent of Brigham Young, testified in answer to question 3 (4).

"In the Fall of 1867 I was instructed by Brigham Young, "Sen., to have Brigham Young, Jr., who was at that time

"residing upon the lot, to remove from it, and let Orson "Pratt have the use of it, and to collect rent from him for "such use, at fifty dollars per month; I did so, and Orson "Pratt came into the possession of it with his wife, Sarah "M. Pratt, and from that time until the Spring of 1869, "when I ceased to be the agent of Brigham Young, I col- "lected of T. W. Ellerbeck, as the agent of Orson Pratt, "fifty dollars per month rent of the said premises."

"Ques. 5. During the time, from the Fall of 1867 to the "Spring of 1869, state, if you know, whether or not Brig- "ham Young was the owner of that lot, and in possession of "it?

"Ans. To the best of my knowledge, he was; I so under- "stood; he had the control and possession of it."

This testimony was excluded by the rulings of the District and Supreme Courts. (Sixth Assignment of Error.)

The receipt of this rent by Park was further verified by entries in his cash book. (8.)

Brigham Young, Sen., testified that he bought the lot in question from Orson Pratt in 1861 or 1862, (9,) and paid from three to five thousand dollars for it.

All this testimony was ruled out. (Eighth Assignment of Error.)

A deed from Orson Pratt to Brigham Young (5, Exhibit A,) for lot 5, block 76, for the consideration of four thousand dollars, dated October 29, 1861, and properly recorded on November 2, 1861, was also ruled out upon appeal. (Seventh Assignment of Error.) The authenticity of the signatures of Orson Pratt, and of the subscribing witnesses to this deed or transfer was proved by James Jack, (4), W. W. Riter, (8), and T. W. Ellerbeck, (10).

The only witnesses produced by Sarah M. Pratt, to support her claim to the half lot, were herself and two sons, Harmel and Arthur. (pp. 12–17.)

They do not deny the sale of the lot by Pratt to Young, in 1861; Mrs. Pratt merely says, (14): "I never considered "that he sold it. He never sold it to my knowledge; he "told me positively he would not sell it."

She further admits (14), that she went upon the lot in 1868, "by the permission of Brigham Young." Nor is any pretence made by the appellee's witnesses to disprove, that subsequent to 1868 rent had been and was still paid by Orson Pratt to Brigham Young, for the premises.

The only facts attempted to be established by the appellee's evidence were: 1st. That she and her children were residing upon the half lot at the time of filing their declaratory statements, (12, 15, 16). 2d. That her husband Orson Pratt, was living separated from her, and contributed but little towards her support; how much or how little the witnesses refuse to say, (13, 15, 17); that he had four or five other wives and families living in Salt Lake City, and 3d: That she and her sons had made certain repairs to the house and fences, and had laid out a few trees and vegetable patches upon the lot. (15,) (17).

These witnesses assert that Sarah M. Pratt was occupying the lot as the head of her family, independently both of Orson Pratt and Brigham Young, but adduce no other proof of this condition of affairs, beyond that just mentioned, (12–17).

Yet the Court below (as well as the District Court), overruled the findings of the Probate Court, which had awarded the lot to Brigham Young, upon the evidence produced before it, and declared that Sarah M. Pratt was entitled to the premises in dispute. This decision was based upon the mere and naked fact of Mrs. Pratt's residence thereon at the time of the filing, which the Court ruled was of itself sufficient to give her a title under the Townsite Act, holding that no dependent relation of tenancy to Brigham Young or any other

person could affect this title, and excluding as irrelevant all evidence tending to establish such a relation.

The Supreme Court (Shaeffer, C. J.), say, *inter alia*:

"Whatever interest the appellant had in the premises, on "or before March 12, 1868, vanished upon the abandonment, "or surrender of the possession to the respondent; and she "being for the purposes of this proceeding, the head of her "family, and actually occupying the said half lot, as the "residence and home of herself and family, from the 12th "of March, 1868, until long after the entry made by the "Mayor of Salt Lake City, she is, in our opinion, entitled to "a deed for the same. The admission or rejection of the "evidence which the Court below declined to consider, does "not affect the status of the case, and if it had been admitted "as competent by the District Court, and if the Court had "given it all the force which could reasonably be claimed for "it, the appellant would not in our opinion be entitled to the "half lot in controversy. The judgment of the Court below "must therefore be affirmed." (31).

This decision of the Supreme Court of Utah, is now assigned for error.

ASSIGNMENTS OF ERROR.

The said appellant assigns the following errors committed by the Supreme Court of the Territory of Utah, in this cause, to wit:

First. The said court erred in adopting the findings of fact made by the District Court of the third judicial district of said Territory, in this:

1st. The evidence does not show that the said appellee was at the time of the entry of the land in controversy by the trustee, or at any other time, the occupant or in the possession thereof in her own right; but, on the contrary, the evidence establishes that the said appellee, as the wife of Orson Pratt, was let into the possession thereof in March, 1868, and has since occupied it by permission of the said appellant and as his tenant.

2d. The evidence does not show that the appellee and her children have supported themselves as stated in the fifth finding of fact; but on the contrary, it establishes that Orson Pratt, the husband of said appellee, contributed to such support.

3d. The evidence does not show that the said appellee has been the head of her family, as stated in the sixth finding of fact; but it establishes that she is the wife of Orson Pratt, and that he is the head of the said family.

4th. The evidence shows that the appellant claimed rent of the said Orson Pratt for the use of the premises in controversy while the said appellee and her children were living on the same, and that he collected rent therefor a portion of the time, from March, 1868, until 1872.

Second. The said Supreme Court of said Territory erred in affirming the judgment and decree of the said district court in this cause, is this:

1st. The said District Court erred in ruling out the sixth and seventh interrogatories put to Brigham Young, Jr., a witness on the part of said appellant, and the answers of said witness thereto.

2d. The said District Court erred in excluding and ruling out the answer of Hamilton G. Park, a witness on the part of appellant, to the third interrogatory put to him, and also in ruling out the fifth interrogatory put to the same witness, and his answer thereto.

3d. The said District Court erred in ruling out Exhibit A, offered in evidence by the said appellant.

4th. The said District Court erred in ruling out the answers of Brigham Young, a witness on his own behalf, to the first, second, third, fourth, fifth, and sixth interrogatories put to him.

5th. The said District Court erred in rendering its judgment and decree in favor of the appellee, for the reason that the said decree is not supported by the facts found.

6th. The said District Court erred in denying the motion of the said appellant to dismiss the appeal taken by the said appellee in said cause from the Probate Court of Salt Lake County, and in refusing to dismiss the said appeal.

Wherefore the said appellant prays that the judgment and decree of the said Supreme Court of the Territory of Utah be reversed, and that a mandate be issued from this court directing the said Supreme Court to reverse the said judgment and decree of the said District Court, and directing the said District Court to dismiss the appeal herein taken from the Probate Court of Salt Lake County.

E. D. HOGE AND
WILLIAMS & YOUNG,
Counsel for Appellant.

ADDITIONAL ASSIGNMENTS OF ERROR ON BEHALF OF THE APPELLANT AND PLAINTIFF IN ERROR.

First. The Supreme Court of the Territory of Utah erred in affirming the fifth finding of fact by the District Court of the Third Judicial District of Utah Territory, as follows: That Sarah M. Pratt and her children have supported themselves by their labor and means since March 12, 1868; that they have put improvements on the lot by repairs to the house, fencing, setting out trees, plants, &c.

Second. In affirming the sixth finding of fact of the said District Court, as follows: That Sarah M. Pratt has been the head of her family for ten years previous to November, 1873.

Third. In affirming the seventh finding of fact of the said Court, as follows: No rent has been claimed of, or "paid by," the said Sarah M. Pratt for said premises since she went into possession in 1868, nor by Orson Pratt or any authorized agent of his since that time.

Fourth. In affirming the eighth finding of fact of the said Court as follows: That Orson Pratt has never supported his wife, Sarah M. Pratt, and her family since March, 1868, and has contributed but a very small part towards her support.

Fifth. In affirming the ruling of the said District Court, which excluded the sixth and seventh interrogatories put to Brigham Young, Junior, a witness on the part of the appellant, and the answers of said witness thereto, as follows:

"Ques. 6. State whether or not you have ever been an "agent for your father, Brigham Young, in relation to his "real property, and if so, at what time?

"Ans. During the year 1872 I was such agent.

Ques. 7. State whether or not, during that time, you ever "received as such agent, from Orson Pratt, Sen., any rent "for the occupation of that lot, or any portion of it; and if "so, state the amount?

"Ans. I did receive rent from his reputed agent for the "occupation of a portion of said lot, the amount being fifty "dollars per month, which I received twice for two months "rent."

Sixth. In affirming the ruling of the said District Court, which excluded the answers of Hamilton G. Park, a witness on the part of the appellant, to the third interrogatory put to him, and also in ruling out the fifth interrogatory put to the same witness, and his answers thereto, which were as follows:

Hamilton G. Park, the real estate agent of Brigham Young, testified in answer to question 3, (4).

"In the Fall of 1867 I was instructed by Brigham Young, "Sen., to have Brigham Young, Jr., who was at that time "residing upon the lot, to remove from it, and let Orson "Pratt have the use of it, and to collect rent from him for "such use, at fifty dollars per month; I did so, and Orson "Pratt came into the possession of it with his wife, Sarah "M. Pratt, and from that time until the Spring of 1869, "when I ceased to be the agent of Brigham Young, I col- "lected of T. W. Ellerbeck, as the agent of Orson Pratt, "fifty dollars per month rent of the said premises."

"Ques. 5. During the time, from the Fall of 1867 to the "Spring of 1869, state, if you know, whether or not Brigham "Young was the owner of that lot, and in possession of it?

"Ans. To the best of my knowledge, he was; I so under-"stood; he had the control and possession of it."

Seventh. In affirming the ruling of the said District Court which excluded Exhibit "A," offered in evidence by the said appellants, as follows:

Be it known by these presents, that I, Orson Pratt, of Great Salt Lake City, in the County of Great Salt Lake, in the Territory of Utah, a rightful claimant and owner of possession of lot 5, block 76, containing one and one-fourth acres, as platted in the plat "A," Great Salt Lake City survey, &c., do for the sum of four thousand dollars, paid by Brigham Young, Senior, of Great Salt Lake City, the receipt whereof is hereby acknowledged, sell, release, quit claim and transfer all my right of claim, interest, and possession of and to the aforesaid premises, together with all the rights, privileges, and appurtenances thereunto belonging to the said Brigham Young, Senior, his heirs and assigns.

Dated this twenty-ninth day of October, 1871 [1861.]

Albert Carrington,
James A. Little. } (Signed) ORSON PRATT.

TERRITORY OF UTAH,
COUNTY OF SALT LAKE. }

I, John T. Caine, a Notary Public in and for the said County, certify that the signer of the above transfer, personally known to me, appeared this thirty-first day of October 1861, and acknowledged that he, of his own choice, executed the foregoing transfer.

JOHN T. CAINE,
Notary Public.

Eighth. In affirming the ruling of the District Court which excluded the answers of Brigham Young, a witness on his

own behalf, to the first, second, third, fourth, fifth, and sixth interrogatories put to him, as follows: "Q 1. Who is the "owner of lot 5, block 76, plat 'A,' Salt Lake City Survey? "A. I am. Q 2. When did you become the owner of it? "A. In 1861 or 1862. Q 3. Of whom did you buy it? "A. Of Orson Pratt, Senior. Q 4. What consideration did "you give him for it? A. I cannot tell exactly the amount. "Q 5. Who is in possession of the lot at the present time? "A. I am, as the owner of it. There are two tenants on it. "Q 6. You say you cannot remember what you paid Mr. "Pratt for it. Can you state approximately? A. From "three to five thousand dollars."

Ninth. In affirming the decree of the said District Court, which awarded the south half of lot 5, block 76, plat A, Salt Lake City survey, to the appellee, Sarah M. Pratt.

Tenth. In decreeing that the said Sarah M. Pratt was entitled to the said half lot.

Eleventh. In decreeing that the appellant, Brigham Young, Sr., was not entitled to the south half of block 76, plat A, Salt Lake City survey.

Twelfth. In holding that the mere physical possession and residence of Sarah M. Pratt upon the half lot entitled her to a deed therefor, irrespective of any relation of tenancy which might be existing between herself and the said appellant.

WILLIAMS and YOUNG,
RAWLINS and SHEEKS,
GEORGE W. BIDDLE,
Of Counsel for Appellant.

BRIEF OF ARGUMENT.

Under the view of this case taken by the Court below (*ante* 7) the following facts, which were in evidence before the Probate Court, must be taken as admitted in the case:

1st. That Orson Pratt having built upon and improved Lot 5, Block 76, Plat A, conveyed it to Brigham Young in 1861, in consideration of the sum of four thousand dollars.

2d. That between the years 1861 and 1868 Brigham Young exercised exclusive dominion over the lot.

3d. That in 1868, Sarah M. Pratt, the wife of Orson Pratt, was permitted by Brigham Young to occupy half of the lot, and that she was still residing thereon, with grown-up sons and other members of her family, at the time of filing her claim to the land.

4th. That Orson Pratt, although living in a different part of the city, and not wholly supporting Sarah M. Pratt, was, nevertheless, at the time of the entry and filing, paying rent to Brigham Young for the half lot in question at the rate of fifty dollars per month.

5th. It is an irresistible inference from the last fact (in the absence of any contradictory testimony) that Sarah M. Pratt was occupying the lot merely as the wife (or if this term be refused to a polygamous relation), as the agent of Orson Pratt, and therefore indirectly as the tenant of Brigham Young.

We have therefore, as claimants for this half lot, on the one hand, one who (according to the law ordinarily existing in civilized communities) was a landlord, who had paid full value for the demised premises, and had never ceased to re-

ceive the rent, and exercise the dominion incident to such a position; on the other hand, the tenant, not denying the relation, but basing her claim upon the accidental fact of a bare, physical residence upon the half lot at the time the assertion of such a claim became possible.

The single question brought up for determination by this Court is, which of these two persons, the landlord or the tenant, is the *occupant* of the half lot, under the true construction and meaning of the Act of Congress of March 2, 1867, called the Townsite Act (Revised Statutes, 2d Ed., Sec. 2387), which reads as follows:

"SECTION 2387.—Whenever any portion of the public "lands have been or may be settled upon and occupied as a "town site, not subject to entry under the agricultural pre-"emption laws, it is lawful, in case such town be incorporated, "for the corporate authorities thereof, and, if not incorporated, "for the judge of the county court for the county in which "such town is situated, to enter at the proper land-office, and "at the minimum price, the land so settled and occupied in "trust for the several use and benefit of the *occupants* thereof, "according to their respective interests; the execution of "which trust, as to the disposal of the lots in such town, and "the proceeds of the sales thereof, to be conducted under "such regulations as may be prescribed by the legislative "authority of the State or territory in which the same may "be situated."

The Act of the Territory of Utah, which was passed to regulate the execution of this trust (Compiled Laws of Utah, 380) contained, *inter alia*, the following provision:

"(1168) SEC. 3. That each and every person, or association, "or company of persons, or corporation claiming to be the "rightful owner of possession, occupant or occupants, or to be

"entitled to the occupancy or possession of such lands, or to "any lot, block, share, or parcel thereof, shall, within six "months after the first publication of such notice, in person, "or by his, her, or their agent or attorney, sign a statement, "in writing, containing an accurate description of the par- "ticular parcel or parts of land in which he, she, or they "claim to have an interest, and the specific right, interest, or "estate therein, which he, she, or they claim to be entitled to "receive, and deliver the same to the clerk of the probate "court of the county in which such town or city is situated, "and the clerk of said court shall enter such statement in a "book to be kept for that purpose, and file and preserve the "same in his office, noting the day of filing. The filing of "which statement shall be considered notice to all persons "claiming any interests in the lands described therein of the "claim of the party filing the same; and all persons failing to "make and deliver such statement within the time limited in "this section, shall be forever barred the right of claiming or "recovering such land, or any interest or estate therein, or in "any part, parcel, or share thereof, in any court of law or "equity: *Provided*, That when good cause is shown why such "statement could not be filed within the time herein specified, "the judge may extend the time, not exceeding one year from "the first publication of said notice."

Now, it is fully conceded that in the public lands and town communities to which these statutes relate, the rules and analogies which ordinarily govern the holding and transfer of real estate, have no necessary application. As against the United States, no *title* can be said to have existed in any of the settlers prior to the "Town Site Act." Yet it is no less true, that the exigencies of increasing population and rapidly crystalizing social life, had compelled the inhabitants, long before that time, to observe *inter sese* rules of *quasi* title, and

ownership, which approximated very closely to those existing elsewhere, and received all the reverence accorded to the positive and unquestioned laws of other communities. By this "Town Site Act." the Government and true owner of all the land, first relinquished its undisputed dominion, and vested all its right in the persons thereby designated, and in no others.

The terms employed by the Legislature to mark out the persons entitled to land settled and occupied as a townsite are "*the occupants thereof according to their respective interests.*' *Occupants* alone can claim under the act, and it is unnecessary to state that the Territorial Statute which regulates the manner in which the rights here given are to be ascertained and the procedure by which they are to be established, must follow harmoniously the Act of Congress; any enlargement or restriction of the qualification for title therein laid down, being simply void.

Who, then, are the *occupants* contemplated by this legislation?

And first, it is to be observed that the object of the legislature obviously is to confirm and give positive sanction to the already existing rights or supposed rights, rather than to overturn them, and create new ones. It was perfectly competent for the absolute owner to select any person or class of persons whatsoever, as the objects of its bounty; but those were chosen who had some existing interest and connection with the lands in question. It is apparent from the whole tenor of the Act, so apparent, that further argument upon the point is unnecessary, that by *occupants* were meant not strangers, but those who possessed more or less of that *quasi* title which existed even prior to the Act.

But further still, by *occupants* were not meant those original possessors of the land, who once having held the *quasi title*, had parted with it by abandonment or sale before the

entry by the mayor; in other words, AN EXISTING DOMINION OR EXERCISE OF OWNERSHIP, WITH OR WITHOUT PHYSICAL POSSESSION, AT THE TIME OF THE ENTRY, is absolutely essential to constitute an occupant within the meaning of the Act; without this, *occupancy* cannot be said to exist. So far this Court has actually decided in construing an act identical in its material portions with the one now under consideration.

The case is that of *Cofield* vs. *McClelland*, 16 Wallace 331–334, and arose as follows:

A general act of Congress was passed on the 28th of May, 1844 (5 Stat. at Large, 657), by which under circumstances similar to those in the present case, the Probate Judge was authorized to enter at the proper land office, the land settled and occupied by settlers who had gone upon the land before the time when it had been surveyed and become subject to public entry. The entry by the Probate Judge was directed (in language identical with that employed in the Act of 1867) to be made "in trust for the several use and benefit of "the occupants thereof, according to their respective inter- "ests, the execution of which trust as to the disposal of the "lots in such town, and the proceeds of the sale thereof, to "be conducted under such rules and regulations as may be "prescribed by the legislative authority of the State or Ter- "ritory in which the same is situated." A subsequent Special Act (May 28, 1864, 13 Stat. at Large, 94) for the relief of the citizens of Denver was passed, containing language to the same general effect, the Probate Judge being in the last statute directed to enter the lands "in trust for the several "use and benefit of the rightful occupants of said land, and "the *bona fide* owners of the improvements thereon, accord- "ing to their respective interests."

The principal question raised in the case was whether the territorial statute (of March 11th, 1864), passed in pursuance

of the first of the above Acts, was in harmony with that Act. The territorial law provided that the probate Judge should hold in trust for "the person or persons who shall have, pos- "sess, or be entited to the possession or occupancy thereof, "according to his, her, or their respective rights or interest "in the same, as they existed in law or equity, *at the time of* "*the entry of such lands, or to his, her, or their heirs or as-* "*signs.*" Upon this point Mr. Justice HUNT, delivering the opinion of this Court, said:—

"This regulating Act of the Territory is in harmony with "the Acts of Congress. It expresses more explicitly than "do those Acts the statement that THE OCCUPATION AND "POSSESSION WHICH GIVES THE RIGHT IS THAT WHICH EXISTS "AT THE TIME OF THE ENTRY OF THE LANDS BY THE PROBATE "JUDGE. THOSE IN POSSESSION OF THE LAND WHEN THE "ENTRY SHALL BE MADE BY THE PROBATE JUDGE ARE THE "PERSONS FOR WHOM HE HOLDS THE LANDS IN TRUST, AND "TO WHOM HE IS TO MAKE THE RESPECTIVE DEEDS. Although "less explicitly declared, this is the construction and mean- "ing of the Acts of Congress also."

It being settled, therefore, that the occupation which gives the right, is one which exists at the time of the entry, not one which is prior and interrupted, the next inquiry is as to the *quality* of that occupancy. Is it a possession which is necessarily physical, or may it be a possession which is indirect, through another, but no less actual and existing? The Court below considered that the bare fact of physical residence upon the land, no matter how casual and dependent, was sufficient to constitute occupancy, and that fact, once established, concluded all further inquiry. When we consider the object of the Act of Congress, the absurdity of such a position becomes manifest. By its very terms it is applicable only to organized, incorporated communities. The state of facts invariably present in such municipalities must

have been contemplated by the Legislature; the large number of those who by labor or the investment of capital have acquired (as against all, save the United States) the ownership of more houses and lands than they can physically occupy; the equally large number of those who, without expenditure upon, or improvement of the lands, reside upon them by the permission of the owners, as tenants, agents, and servants.

Is it possible that Congress intended to wrest away the fruits of their toil and wealth from the former class, to bestow them upon the latter? Was it imagined, that a tenant or servant residing in a house purchased by another's money, or erected by another's labor, might claim that house as his own, upon the entry of the townsite by the Mayor? To ask these questions is to answer them. Such a confiscation of property can never have been in the mind of Congress.

As against the real owner and improver, a bare derivative possession cannot bestow the right.

It is confidently contended therefore, that by the word *occupants*, is meant simply those undisputed owners and improvers of the land, who at the time of the entry are exercising dominion over it, either directly by an actual physical residence thereon, or indirectly by the possession of their tenants or agents; *occupying* in the latter case just as truly and actually as in the former. It remains but to apply this interpretation of the Act to the present case.

The appellant paid full value for the lot in 1861, and a member of his family resided upon it until three years before the entry by the mayor in November, 1871.

In 1868, the appellee went upon the lot by permission of the appellant, and was there residing at the time of the entry. *No relinquishment of ownership by the appellant is shown, nor assertion of independent title by the appellee until after the entry.*

Which is the true occupant?

The appellant sought to introduce evidence to show that the appellee was in possession as his *tenant*, he receiving rent for the premises from her husband up to and after the date of entry.

Now, if the meaning of the Act above contended for is correct, the establishment of a relation of tenancy would have settled beyond dispute the appellant's right as an occupant; yet the Court below excluded this evidence, and held that the physical residence alone of the appellee, entitled her to the lot irrespective of other considerations.

This decision of the Court below was the more extraordinary in view of the fact that by an almost co-temporaneous decision upon the "Townsite Act" (*Stringfellow et al* vs. *Cain et al* argued here this term) they had declared that no actual possession, nor long enjoyment of undisputed dominion, nor erection of expensive improvements by the present occupants of land, could avail to defeat the right of those who although *never themselves in possession*, claimed to have derived a title from an ancestor, dead these sixteen years.

Whether the evidence excluded by the Court below would have conclusively established the existence of a relation of landlord and tenant between the appellant and appellee, it is unnecessary, for the purposes of this argument, to discuss; but that it tended to establish such a relation all must admit, for it is incredible that a husband, or one who supposes himself to be legally such, should have paid rent for premises occupied by his wife, while she was all the while holding a position adverse to and independent of both himself and the alleged landlord.

The evidence was, therefore, relevant, and its exclusion worked injury to the appellant. For this error the judgment of the Supreme Court of Utah should be reversed.

Finally, it is submitted that the findings of fact of the District Court, affirmed by the Supreme Court of the Territory, and complained of in the first four assignments of error (in substance, that Mrs. Pratt, the appellee, was supporting herself as the head of her family apart from Orson Pratt, and that no rent had been paid by herself, Pratt, or his agent, to Brigham Young for the half lot,) were wholly unwarranted from the evidence set forth on the record. This Court may consider the evidence in this proceeding, and reverse for errors of fact as well as of law.

SHEEKS & RAWLINS,
WILLIAMS & YOUNG,
Salt Lake City.

J. RODMAN PAUL,
GEORGE W. BIDDLE,
Philadelphia.
Of Counsel with the Appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

BRIGHAM YOUNG		No. 183.
vs.	}	October Sessions,
SARAH M. PRATT.		1878.

Error and Appeal from the Supreme Court of the Territory of Utah.

ADDITIONAL BRIEF OF THE PLAINTIFF IN ERROR AND APPELLANT.

It appears by the record (p. 1), that the Probate Court for Salt Lake County, Utah, rendered its decision, awarding the premises in dispute to Brigham Young, upon the *28th day of November, A. D. 1873.*

It was not until the *3d day of February, A. D. 1874,* that Sarah M. Pratt, the adverse claimant, filed and served her notice of appeal from this judgment, to the District Court of the Third Judicial District (p. 1).

A motion to dismiss this appeal was made by the respondent, Brigham Young, for reason, *inter alia*, that the appeal was not taken and perfected within the time required by law. After argument, the District Court overruled the motion, to which ruling the respondent, Brigham Young, duly excepted. (Record, p. 2.) This ruling of the District Court was affirmed by the Territorial Supreme Court (p. 29) whose action is now assigned for error (6th head under the second of the original assignments of error, brief, p. 9).

Now it seems clear that the appeal of Mrs. Sarah M. Pratt from the decision of the Probate Court to the District Court, was not taken within the time required by law.

The territorial act of 1869, prescribing rules and regulations for carrying into effect the "townsite act." (Compiled laws 381), provides in section 4, as follows:

"If either party shall feel aggrieved at the decision of said "court [the Probate Court], he she or they shall have the "right of appeal to the District Court, *as in other cases.*

Again, in section 5, (p. 382) which regulates the procedure where there are no adverse claimants.

"If the court shall decide against the validity of such "claim, the decision shall in like manner be entered of record, "and the minutes of testimony preserved; and in all cases "appeals and writs of error shall be allowed from the decision "of such court, to any party in interest *as in other cases.*"

The right of appeal therefore from the Probate to the District Court, in such cases as the present, is to be regulated by the general law of the territory in regard to appeals, existing at the time the particular appeal was taken.

By the Territorial Act relating to the judiciary, approved January 19, 1855, (Laws of Utah Edition, of 1870, p. 31), Section 30, it is provided:

"Appeals are allowed from all decrees and decisions of the "Probate to the District Courts, except when otherwise ex- "pressed, on the merit of any matter affecting the rights or "interests of individuals; the appeal shall be taken *within* "*thirty days* from the day on which the decision was made, "and shall be taken by claiming the appeal and filing in the "Clerk of the Probate Court's office, a bond with one or "more sureties, and a penal sum to be approved by the Pro- "bate Judge or Clerk."

This was the law that governed the taking of appeals from the Probate to the District Court, at the time the appeal was taken by Sarah M. Pratt, in this case. THE DECISION OF THE PROBATE COURT WAS RENDERED ON THE 28TH DAY OF NOVEMBER, 1873, AND HER APPEAL WAS TAKEN ON THE 3D DAY OF FEBRUARY, 1874. IT WAS NOT, THEREFORE, WITHIN THE THIRTY DAYS, AS REQUIRED BY LAW.

The court below give no reason for their decision that the appeal was taken within the time; they simply say, (Record p. 29.) "We think the appeal from the Probate Court was properly taken, and there was no error in over-ruling the motion to dismiss."

It may be said on the other side, that the judiciary act of 1855 above cited, was repealed upon this point, by the Civil Practice Act or Code of Utah of February 1870, (Laws of Utah, 1870, p. 17), which by section 605 (p. 124) repeals *inter alia* "so much of an act in relation to the judiciary, approved January 19th, 1855, as conflicts with this act."

But an examination of Title IX* Civil Practice Act, shows

*SEC. 325. A judgment or order in a civil action, except when expressly made final by this act, may be reviewed as prescribed by this title, and not otherwise

that the provision of section 328 (p. 77), that "an appeal "may be taken from a final judgment in an action or special "proceeding commenced in the court in which the judgment "is rendered, *within one year* after the rendition of judgment." applys only to the *District Court* and in no wise affects the pre-existing law regulating appeals from the Probate Court.

By its title The Civil Code of 1870 is "An Act to regulate "proceedings in civil cases in the Courts of Justice for this Ter- "ritory," and was intended only for the government of causes in the Courts of general jurisdiction, viz.: the District and Supreme Courts, and not for the peculiar proceedings confided to that limited and statutory tribunal the Probate Court. *Civil cases* have no place in the jurisdiction of the latter Court.

This very point has been decided by the Supreme Court of Utah, in a case arising shortly prior to the one at bar, and it can hardly be supposed that the Court below intended by their ruling in the present case, in so summary a manner, without reason given or mention made, to overrule their own former decision. The case was that of *Golding* vs. *Jennings*, 1 Utah Reports, 135.

SEC. 327. Any party aggrieved may appeal in the cases prescribed in this title. The party appealing shall be known as the appellant, and the adverse party as the respondent.

SEC. 328. An appeal may be taken:—First—From a final judgment in an action or special proceeding commenced in the court in which the judgment is rendered, within one year after the rendition of judgment. Second—From a judgment rendered on an appeal from an inferior court, within ninety days after the rendition of the judgment. Third—From an order granting or refusing a new trial, from an order granting or dissolving an injunction, from an order refusing to grant or dissolve an injunction, and from any special order made after the final judgment, within sixty days after the order is made and entered in the minutes of the court. Fourth—From an interlocutory judgment or order in cases of partition which determines the right of the several parties, and directs partition, sale or division to be made, within sixty days after the rendition of the same.

There a judgment in *a civil action* was obtained by Jennings in the Probate Court, from which Golding took an appeal to the District Court; the question before the Supreme Court was whether, in such case, an appeal would lie. It was held that it would not.

EMERSON, J., delivering the opinion of the Court, said: "When these proceedings were had in the Probate Court, "the Practice Act was in force, and by that Act judgments "in civil actions are to be reviewed on appeal in the mode "and manner prescribed in it, and not otherwise.

"So that there is no appeal in civil cases, except such as "is provided in that Act, and there is nowhere in it any "provision, either in express terms, or by necessary impli- "cation, for an appeal from the Probate Court to the District "Court. In fact I have been able to find but one reference, "in terms, in the whole Act, to the District Courts, and "that is in the provision that the Supreme Court may "prescribe rules for their government.

"This omission on the part of the Territorial Legislature "can not be regarded as accidental, but was evidently with "the purpose and intent of ignoring these Courts as far as "possible, and while they made them subject to rules that "might be prescribed by this Court, they did not place the "Probate Courts, in which they had attempted to vest a "jurisdiction concurrent with that given by the Organic Act "to the District Courts, under any supervising power what- "ever, as to the manner in which they should exercise this "extended jurisdiction."

The Act of 1855 is the only law which gives an appeal from the Probate to the District Court, and that Act requires that it shall be taken within *thirty* days.

The Court below was manifestly in error, therefore, in upholding an appeal taken after the expiration of that period,

and the judgment of the Probate Court awarding the premises in controversy to Brigham Young should remain as the final judgment in this cause.

SHEEKS & RAWLINS,
WILLIAMS & YOUNG,
Salt Lake City.

J. RODMAN PAUL,
GEORGE W. BIDDLE,
Philadelphia.
Of Counsel with the Appellant.

IN THE SUPREME COURT

OF THE UNITED STATES.

BRIGHAM YOUNG,
Plaintiff in error and Appellant,

vs.

SARAH M. PRATT,
Defendant in error and Appellee.

No. 183.
Oct. Session,
1878.

Error and appeal from the Supreme Court of Utah Territory.

BRIEF OF DEFENDANT AND APPELLEE.

ROBERT N. BASKIN,
Of Counsel for Defendant and Appellee.

Salt Lake Tribune Print.

POINTS AND AUTHORITIES.

I.

A writ of error in this case does not lie from this court to the Supreme Court of Utah Territory.

As this question was fully discussed in the case of Stringfellow et al. vs. Joseph M. Cain et al., just submitted, the Court is referred to the brief of the appellees in that case, on the point.

II.

The objections urged by the Appellant are not presented in the record, in such a manner as to authorize this court to examine the same.

1st. Because the statement required by the act of Congress concerning the practice in the Territorial courts and appeals therefrom, approved April 7th, 1874, 18th Stat at Large, p. 27, sec. 2; Rev. Stat. of Utah. p. 50, was not made and certified as in said act provided.

2d. This action being in the nature of a case in equity, and there having been a statement on appeal made under the 330th section of the Utah Practice Act (Rev. Stat. of Utah, 493), containing all of the evidence in the case, and one of the points of objection in said statement being the insufficiency of the

evidence to support the findings of the District Court, the appeal from the District Court to the Supreme Court of Utah, brought up the whole case for review on both the evidence and the law; and the Supreme Court of the Territory decided the whole case on its merits without regard to the action of the District Court in rejecting the evidence ruled out, as the opinion of Mr. Chief Justice Schaeffer shows. If the Appellants desired to have the action of the Supreme Court of Utah reviewed in this court, he should have had the former court make the statement required by the 2d section of said act of Congress before referred to; not having done so, there is no objection presented by the record on which this court can take action.

3d. If the evidence ruled out had been considered by the District Court, it could not have changed the result and the decree will not be reversed because the same was not considered. But in the Supreme Court of Utah the rejected evidence was considered and, therefore, the Appellant has not been injured by the action of the District Court.

III.

The evidence ruled out by the District Court was properly excluded.

1. The 6th and 7th answers of Brigham Young, Jr., were properly excluded.

1st. Because the date of his alleged agency was in 1872, long after Brigham Young, according to his own statement, had put Mrs. Pratt into possession (3), and the alleged rent collected by this agent was

for the months of "June or July or May and June" (8), periods subsequent to the filing of Mrs. Pratt's declaratory statement.

2d. It was not shown that Ellerbeck was the agent of Orson Pratt or authorized by him to pay rent.

2. The answers of Hamilton Park to the interrogatories 3—5 (6) were properly excluded.

1st. Because the instruction of Brigham Young to him in the fall of 1867 was irrelevant, as it appears by both the statements of Brigham Young and Mrs. Pratt that the latter was put in possession of the disputed premises on the 12th of March, 1868 (10,14). The instructions of Brigham Young to Park, as testified to by the latter were, to let Orson Pratt have the use of the lot and collect rent from him. Mrs. Pratt could not be affected by any arrangement which her husband and Young may have made previous or subsequent to the one between herself and Young by which possession of the premises was turned over to her.

2d. Because Ellerbeck was not shown to be the agent of Orson Pratt, and even had this been shown, any transaction between Young and Orson Pratt could not in any manner affect the rights of the Appellee; when Brigham Young abandoned possession by voluntarily and unconditionally relinquishing the same to Mrs. Pratt, her right to the premises became vested and thereafter could not be affected except by some voluntary act of her own.

3rd. The exception taken to the action of the Court

in excluding Park's answer to the third Interrogatory being general (18) if ether of the above objections is well founded the exception must fail. The same may be said of the other exceptions.

3. The exclusion of Exhibit A (18) requires no comment.

4. The answer of Brigham Young, Sr., to the 1st, 2d, 3rd, 4th and 5th interrogatories were properly excluded.

1st. Because the 1st and 2d (9) stated a conclusion of law.

2nd. The 3d and 4th (9) were irrelevant, as it made no kind of difference of whom Brigham Young may have purchased the premises, previous to the date of Mrs. Pratt's possession of the same, or how much he may have paid therefor.

3rd. The 5th was wholly irrelevant as a bona fide possession, or the right to possession, at the date of the entry of the city, gives the right to the deed.

IV.

The decision of both the District and Supreme Courts of Utah, are predicated upon the abandonment by Brigham Young, of his possession and right to the premises in controversy, by the voluntary and unconditional surrender thereof to Mrs. Pratt, and the subsequent occupation and improvement of the same by her as a home for herself and family. This is clearly expressed in the findings of the District Court, and in the opinion of the Supreme Court of Utah, and the evidence warrants this result. It therefore follows from any view

that may be taken of the case, that Mrs. Pratt at the date of the entry of Salt Lake City was the rightful bona fide owner and occupant of the premises in controversy, and consequently the party entitled to the deed from the Mayor.

V.

The counsel for appellant assert in their brief the following:

"The Court below * * * held that the physical residence alone of "the appellee, entitled her to the lot irrespective of other considerations."

"This decision of the Court below was the more extraordinary in view "of the fact that by an almost co-temporaneous decision upon the 'Townsite "Act' (Stringfellow et al. vs. Cain et al., argued here this term) they had "declared that no actual possession, nor long enjoyment of undisputed "dominion, nor erection of expensive improvements by the present occu- "pants of land, could avail to defeat the right of those, who, although never "themselves in possession, claimed to have derived a title from an ancestor, "dead these sixteen years."

If the Court below had made either of the decisions thus attributed to it, that circumstance would not have been more "extraordinary" than the deliberate assertion of counsel that such decisions have in fact been made by that Court, or that counsel, in view of the facts disclosed in the case of Stringfellow et al. vs. Cain et al., or at all, should have deliberately referred to the decision of the Supreme Court of Utah in that case, as an "iniquity" (see Appellant's Brief in said case, p. 89). The decision in the lower Court in this case, as also in the case of Stringfellow et al. vs. Cain et al , is before this Court, and a casual inspection of these decisions will show that the counsel for appellant have misapprehended their tenor and effect.

Respectfully submitted,

ROBERT N. BASKIN,

Of Counsel for Appellees and Defendants.